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Journal *of the* American Judicature Society

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EDWIN A. FALK

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A DREAM FULFILLED

THE CHARGE TO THE JURY
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LEGISLATIVE REGULATION OF PROCEDURE
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VOTERS APPROVE JUDICIAL REFORMS
IN MISSOURI AND MARYLAND

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INDEPENDENT JUDICIARY BORN IN VIRGINIA
NATHAN BOONE WILLIAMS

RULE MAKING IN THE PHILIPPINES
JOHN W. WILLIS

AMERICAN JUDICATURE SOCIETY
Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 24 DECEMBER, 1940 Number 4

The Dignity of Man

BY CARL B. RIX

THE MOST compelling statement of democracy is that of Thomas Mann—"We must define democracy as that form of government and of society which is inspired above every other with the feeling and consciousness of the dignity of man."

Proud and dignified Norwegians, Danes, Dutch, Belgians, Czechs, Poles and French no longer have that dignity—they now do as they are told. The next step is to teach them to think as they are told. The degradation will then be complete. A splendid new book has just appeared, The Organization of Courts, by Roscoe Pound. We are brought up standing with the realization that nowhere on the mainland of Europe, except in Sweden and Switzerland, do courts as we know them function. The blackout is almost complete.

The land from which we drew our system of justice is in danger of meeting the same fate. The common law may again be overwhelmed by feudal law. The slow, tortuous journey will again be under way. Human liberty of body and of mind cannot long be suppressed. Can the United States, standing alone among the nations, maintain our system of justice under such an onslaught? The natural guardians of that system are the lawyers of this country. Individual lawyers can do much, but effective action must be accomplished shoulder to shoulder through local, state and national bar associations. The fight must be carried on relentlessly. Every bar association has made some plans, has some unfulfilled hopes for improving the administration of justice. Only lawyers can lead in bringing our machinery and processes of justice to the standard that must compel the confidence and the fealty of the common man. No war leaves a civilization where it stood before the declaration. We begin to see that the

TABLE OF CONTENTS

THE DIGNITY OF MAN, Carl B. Rix..... 99
BAR LEARNS HOW TO WIN IN MD. AND MO..... 100
CHARLES A. BEARDSLEY VS. JOHN H. WIGMORE 101
"ONCE MORE UNTO THE BREACH," Edwin A. Falk.. 102
FEDERAL JUDICIAL SYSTEM NEARS END OF REFORM PROGRAM 106
THE CHARGE TO THE JURY, Morris A. Soper, J.... 111
LEGISLATIVE REGULATION OF PROCEDURE NOT UNCONSTITUTIONAL, Charles A. Beardsley..... 115
IDEAL SELECTION PLAN WINS IN MARYLAND... 117
MISSOURI VOTERS APPROVE JUDICIAL SELECTION AMENDMENT 118
NEW PROPOSALS FACILITATE JUDICIAL SELECTION REFORM 119
DISSATISFACTION WITH PIECEMEAL REFORM, Charles E. Clark, J..... 121
SOUTH DAKOTA JUDGES UNITE TO MODERNIZE PROCEDURE 123
INDEPENDENT JUDICIARY BORN IN VIRGINIA, Nathan Boone Williams..... 124
NEW ABA COMMITTEE ON PROCEDURE BEGINS WORK, David A. Simmons..... 128
RULE-MAKING IN PHILIPPINES UNDER CONSTITUTIONAL POWER, John W. Willis..... 129
STATE DEPARTMENT OF JUSTICE NEEDED..... 130
REVIEW OF JUDICIAL COUNCIL REPORTS..... 132
"RAISE YOUR SPIRIT," A DISSENTING OPINION, Thomas F. Quinn, J..... 134
PRETRIAL SUCCESS IN CHICAGO COURT..... 135

defense of free institutions is, in a sense, a never-ending campaign, and we agree that liberty is well worth a continual struggle.

Even in the preparations we make in the hope that we may ward off actual conflict, we set the stage for genuine reforms. Is there any one reform more vital than a restoration of public confidence that our courts everywhere are prepared to defend the rights our constitutions guarantee? In this period, right now, when we are made to realize the perils threatening what we have called *rights*, it is easier than it ever has been to achieve needed reforms.

Out in the Black Hills of South Dakota a great sculptor has carved a shrine of democracy in stone. Thousands will look to the hills for strength into the faces of Washington, Jefferson, Lincoln and Theodore Roosevelt. Thousands will get the message from them in the great and noble words of Housman, in whose poem a Greek statue speaks to a young man.

"What, lad, drooping with your lot?
I too would be where I am not.
I too survey that endless line
Of men whose thoughts are not as mine.
Years, ere you stood up from rest,
On my neck the collar prest;
Years, when you lay down your ill,
I shall stand and bear it still.
Courage, lad, 'tis not for long:
Stand, quit you like stone, be strong."
So I thought his look would say;
And light on me my trouble lay,
And I stept out in flesh and bone
Manful like the man of stone.

Deep resolves and deep prayers will lift heads high to maintain the dignity of man.

Bar Learns How to Win in Maryland and Missouri

In this number the reader will learn that lawyers in Maryland and Missouri have achieved brilliant victories in their campaigns for reform in judicial selection and tenure. One court of vital importance in Maryland has had its future assured; in Missouri the trial courts in the metropolitan counties, three appellate courts and the supreme court, have been taken out of politics. We are told that majorities in favor of the constitutional amendments, framed by lawyers and supported by lay organizations, reach an unexpected height—in each state—more than 100,000 votes.

We present also a brief survey of progress in the federal system showing that nearly every scheduled reform has been attained. There is now a model for the states. No previous number of the JOURNAL has ever contained so much encouraging news. We must hope that some qualified writer will before long give us an adequate history of the efforts made on behalf of federal judicature since 1913, when Thomas W. Shelton addressing the first national convention of judges, revealed his hope for uniform procedure drafted and adopted by judges as rules of court.

The striking victories for better judicature won in Maryland and Missouri should convince every reader that the organized bar can attain many of its ideals if it will but learn the technique. In most of the states and larger cities for many years bar leaders have made excellent plans for reform but only rarely have their plans been given effect. The evidence now before us seems to justify a dogmatic opinion. It is that the profession must learn to *cooperate* with lay agencies. It means little that a few persistent lawyers have finally induced their association to endorse their reform proposals. To reach that stage the lawyer has been necessary, but to give effect to worthy plans there must be an education of laymen.

Many instances suggest that lawyers exhaust their energy in building up support by a majority of the bar. They seem to assume that what has convinced their colleagues will readily be accepted by legislators, and then, in time, they are surprised and disgusted to find other

lawyers on legislative committees, who deceive lay legislators and so defeat reform by a vote in one chamber or the other.

As our friend, Carl Rix, has shown in his persuasive editorial above, the profession should assist in fighting gangster domination of the world by deserving and gaining public appreciation for improvements in the field of judicature. In this field no layman or lay body can safely lead. Nor can the bar be confident of success in any ambitious effort unless it has first persuaded lay organizations that the object sought deserves their support.

There is no possibility of informing readers as to the precise technique involved in gaining lay support. It is not always a simple thing. There's a good deal to be learned. We can only suggest that information must be obtainable from those lawyers who did acquire the support of citizen organizations in the successful campaigns carried on in Missouri and Maryland.

Nor should it be necessary to say much about the benefit to the legal profession. Lay prejudice may be most unfair, and if so, it seems all the more important to overcome it. It can be overcome only when lawyers have given the strongest proof that the measures they advance are unselfish. Support by the lay leaders is one way of converting public opinion.

In Baltimore, for instance, the People's court has rendered such remarkable services under recent legislation in the past year as to make the public enthusiastic for the amendment which insures a continuance of faithful services. During that year over fifty thousand persons were served by that court. There will be as many each year. From that number a large share will not be disposed in the future to grumble about the law, the court or the lawyers.

Charles A. Beardsley v. John H. Wigmore

In this number readers will find a vigorous argument in opposition to Dean Wigmore's declaration, published in the last preceding number, that legislatures have no constitutional power to impose rules of judicial procedure upon the courts. This reference to the controversy is intended not only to call attention to Mr. Charles Beardsley's protest, but to attempt also a clarification of ideas. It is easy to assume that Dean Wigmore's theory of judicial independence is intended to include all the courts of last resort in the entire country. That was certainly the interpretation given the article by Harry Hibschman, who, at considerable labor, applied the test to all of the state constitutions.

A careful reading shows that only the federal and the Illinois constitutions were analysed by Dean Wigmore, and no reference was had to any other jurisdiction except where he said (par. 1, part III) "all rules of procedure made by 'a' supreme court," the article "a" being equivalent to "any." Questioned on this matter the author replied:

"The article was of course based on the constitutions of those states that have the same express provision as the State of Illinois. However, my article was addressed to the lawyers in all the states, because, for all I know, some supreme courts may have construed their constitutions to the same effect, even though the words of the constitution were not so explicit as in that of Illinois."

The reader of Mr. Beardsley's contribution will observe that he makes no issue as to Dean Wigmore's analysis of the federal judiciary article. That two conspicuous legal scholars should find the authors of the Illinois constitution unable, despite obvious care, to make their decision clear as to the source of procedural authority, is a matter that deserves the attention of lawyers who live by texts and interpretations.

The Editor, though uninvited, contributes two observations: first, contemporary interpretation and consistent usage support Mr. Beardsley; secondly, the words (in the Illinois judiciary article) "laws relating to courts" and "practice" appear to have been chosen expressly to exclude procedure. Fifty years ago practice and procedure meant different things. Twenty-five years ago our profession was more or less committed to the principle (Pound's) of a

"short practice act" and "court-made rules of procedure." In recent years practice has come to mean virtually the same as procedure, and for the excellent reason that the pundits were never able, when the time came, to decide what rules should be legislated as practice, and what other rules should be procedural and made by a court. The Illinois supreme court once was obliged, very much against its will, to decide the controversy we present. The decision was in favor of judicial power for rule-making, against legislative power. But nobody takes that decision seriously, so there you are. See People v. Callopy, 358 Ill. 11.

"Once More Unto the Breach"

BY EDWIN A. FALK†

Although this article does not deal with military or naval defense, its theme is: in time of peace prepare for war.

The smoke has cleared from the field of the 1937 supreme court battle but there must be expected a renewal, sooner or later, of the intermittent campaign against judicial independence. The slim margin by which this most recent assault was repelled should serve as a warning that the defenses require reenforcement.

If those who realize that judicial review is not only "America's unique contribution to the science of politics" but also "the capstone feature of the entire [American constitutional] system," *whose untrammeled and uninfluenced exercise is essential to the preservation of that system,* again defer their support until the next hostile blow is struck, it may be too late. The 1937 packing plan, crudely disguised as a dotage-removal device, was frustrated only because it became evident during the controversy that the normal processes of time soon would accomplish the desired result by reason of deaths and retirements.

The omission of the constitution to fix the size of the supreme court is by no means the only loophole through which a hostile executive-legislative thrust might have been made. It is merely one of the most obvious. The time to plug these loopholes is not when they are exposed in the heat of combat but during a peaceful interlude, when the structure of government can be scrutinized dispassionately and without reference to any pending political issues. Such an opportunity seems to present itself now.

The so-called conservatives can be counted upon for support because they are the ones who man the ramparts whenever danger threatens the constitutional system; and, it should be added, even upon occasions when their anxieties conjure up dangers that exist only in their imaginations. By evincing a continued readiness to protect the supreme court even as presently constituted, those who in 1937 professed concern about enduring principles rather than the immediate program, will have an opportunity to prove their good faith and intellectual honesty.

On the other hand, the plan to stiffen the supreme court's armor should enlist equal support from the factions that delivered the 1937 assault. They were guided on that occasion partly by expediency or fancied expediency and, to the extent that similar considerations influence them now, they presumably woud be eager to forestall a possible counterattack against the new majority, whose current decisions are making drastic changes in fundamental American law along the lines favored by these groups. The "nine old men" having lost their majority to new appointees, those who were eager to bring about this result naturally would be expected to favor measures that would prevent a political reversal in the White House and congress from involving also an accelerated change in the complexion of the supreme court. Deaths and retirements having accomplished what the

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*From King Henry Fifth, first line of scene 1, Act III:

"Once more unto the breach,
dear friends, once more;
Or close the wall up with
our English dead."

†Of the New York City Bar.

attempt at packing sought to achieve, those who for reasons of political expediency threatened the integrity of the institution in 1937 should be its staunchest defenders now.

Furthermore, the support of the sponsors of the 1937 plan should be enlisted by a non-partisan acknowledgment of the degree of merit that their plan possessed, even though packing was its immediate objective. The circumstance that a new administration elected by a decisive endorsement at the polls of a new political program had no opportunity to gain a voice inside the supreme court conference room during the full four years of the presidential term disclosed a defect in the system of appointment. National welfare suggests that every administration have at least one or two appointments, even though, in some cases, there be no new political viewpoint. When the World Court was being organized, the first impulse of the international lawyers formulating the plan was to stipulate that any justice whose nation was a party to a controversy should not sit in that case, but Elihu Root, with characteristic wisdom, prevailed upon his collaborators to provide the exact opposite: that if any party to a controversy was not already represented upon the bench, it should appoint one of its citizens for that case, in order that any peculiarly characteristic national caste of thought should not be denied participation in the judicial process by which the matter at issue would be decided. A fixed rotation in office, such as prevails in the senate, might, by reason of deaths and retirements, result in too rapid a change of membership, even if the term were made relatively long; there might be lost needlessly the great advantages of experience and continuity to a deliberative body of this kind whose specialized scholarship and familiarity with the technical background are essential.

If the project of plugging these loopholes can be kept politically non-partisan in spirit, as it is in purpose, and can be kept dissociated from the 1937 controversy and its aftermath, whose wounds have not entirely healed, there should be no serious opposition in principle. The qualification "in principle" is necessary because even among those eager to see the independence and powers of the judiciary remain unimpaired, there necessarily will be some who will differ as to the method and extent of the protective measures.

There also will be some who will consider it dangerous not to let a sleeping dog lie. They will argue that the Supreme Court can be safeguarded only by an awakened public opinion, which has preserved it so far, and that, were this fundamental bulwark ever removed, mere words on a piece of paper, even in the form of a constitutional amendment, would be of no protective efficacy.

The answer to this contention is twofold. First, while it is true, of course, that a revolutionary tide of overwhelming physical force can destroy any human institution, it is also true that, short of such an upheaval, organized society governs itself by law. It is significant that all dangerous assaults upon the American judiciary so far have been made without open defiance of constitutional forms, and the sole purpose of the present project should be and can only be to prevent future assaults of this nature.

Secondly, it must be remembered that the question of whether the American system was to be established and maintained by popular pleasure, subject, as for example is the British system, to unlimited change or abandonment, or whether it was to be established and maintained by what Hamilton called a "limited constitution," amendable only in the manner stipulated in the instrument, was decided when the constitution was adopted and must be deemed settled until the fundamental principle of a limited constitution is abolished.

The fact that a Hitler or a Stalin would not hesitate to overturn an established institution based upon written law as readily as if it were based merely upon tradition and public opinion does not lead to the conclusion that the strength or weakness of the foundation is unimportant. To advance such a contention would be like arguing that it is not worthwhile fortifying a structure to withstand ordinary seismic tremors unless it also would be able to withstand a major earthquake.

The purpose of plugging the loopholes in the constitution's protection for the supreme court is to prevent, as far as possible and practicable, having a due regard for all of the circumstances, a hostile, unprincipled or shortsighted executive and congress from freeing themselves, within constitutional processes, from judicial review by controlling the personnel or powers of the supreme court and thereby ren-

dering it inoperative as a truly coördinate branch of government. Such preventive measures are worthwhile even though it is realized that to plug holes in the dike will not fend off a tidal wave that some day might sweep over the top.

In seeking to thwart the restraints of an independent judiciary, presidents and legislators have tried to penetrate many constitutional loopholes and there exist many others in danger of the discovery by hostile ingenuity and audacity. These loopholes expose the court to possible interference of three general kinds: withholding certain justiciable questions from the court, controlling decisions of the court, and nullifying the decrees of the court.

The remedy is a constitutional amendment that will plug the loopholes. Its scope and phraseology should be given the most expert and earnest consideration.

The first step is to find as many as possible of the loopholes. There should be an exhaustive study of the constitution itself, what it omits as well as what it contains, and of the history of the supreme court and of efforts to interfere with its independence, and of the origin and development of the doctrine of judicial review from its germ in Coke, down through its growth in seventeenth century England and eighteenth century colonial America. The judicial structures of the several states and of foreign constitutional governments should be scrutinized. For example, it would be helpful to examine the methods that have been used in certain Latin-American republics to reduce judiciaries independent on paper to subserviency to dictatorships, and the processes by which Japan has achieved what is practically fascism, with relatively little violation of the letter of its written constitution.

As a preliminary and tentative chart for the framing of such a constitutional amendment, the following points might be noted:

I

THE JUSTICES

Number. Should be fixed to prevent packing. Nine seems to be a satisfactory number, inasmuch as it gives as large an opportunity for diversity of viewpoint (geographical, political and economic) as is consistent with effective performance of duty (see Chief Justice Hughes' letter to the senate judiciary committee in 1937). The fact that nine is the present number is naturally an important consideration.

Exclusion from the Political Arena. Members of the court should be rendered ineligible to become president or vice-president of the United States, either by direct election of the electoral college or by succession from the cabinet, and possibly to fill certain other public offices.

Removal. The present system of impeachment and trial should be modified so as to prevent a political removal such as almost succeded in the case of Justice Chase. (At the same time, removal in cases of mental or physical incapacity should be rendered simpler.)

Appointment. If feasible, it would be of paramount importance to devise a method of appointment that would vest this power elsewhere than in the executive and legislative branches, but the only practical alternative would be popular election, and experience in the states has proved that such a method produces an inferior bench, so no suggestion is made for any change in the method of appointment.

Terms of Office. If vacancies do not occur at such times as will provide at least two appointments during each presidential term, that number should be created by the required retirement (with full retirement compensation

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The requisite is just law, fair law, strong law. Law cannot be a mere word; it cannot be a mere rite. It must be practical, thorough, just and honest in its application. It must be intelligent and diligent. It cannot be dogma. It cannot be ritual. It must reflect the compact which we Americans have made and by which we seek to live. It cannot cloak stupidities and abuses, misunderstanding and dullness, with large words and trite phrases. The time for that is gone. The situation is too crucial for trifling or for triflers.—*Percival E. Jackson, in Look at the Law, p.* 347.

and status) of the justice or justices senior in length of service upon the supreme court bench, in accordance with a formula calculated to accomplish this end. This assurance of at least two appointments by each administration (i. e., each president or successor during a single term) will have several advantages, including (1) reasonably prompt representation upon the bench of any new political philosophy accepted at the polls, (2) consequent removal of pressure to force such representation, (3) constant infusion of new blood without the undue sacrifice of experience that would be entailed in a regular rotation system, and (4) diminution of likelihood of a "hump" resulting in a sudden change of the majority at or near one time.

II

FUNCTIONS

Judicial Power. The term "judicial power" as used in the constitution should be defined in the proposed amendment in accordance with the construction that has been given to that term by the supreme court in its decisions. This would forestall any effort to narrow the jurisdiction of the court by making a statutory definition of "judicial power."

Appellate Jurisdiction. The proposed amendment should prohibit congress from diminishing the power of the court to hear and decide appeals in cases involving constitutional questions, except to such extent as the court itself, in the exercise of its own discretion, may deem advisable. In other words, the appellate jurisdiction of the supreme court in constitutional cases should be frozen in its present form, subject to being melted away only by constitutional amendment or by the court in prescribing rules for the handling of its own business.

Judicial Review. The duty of the supreme court to refuse to give judicial effect to an executive or legislative act that contravenes the constitution should be confirmed so as to settle that question once and for all.

III

ADMINISTRATION

Financial Independence. The constitution foresaw the necessity of preventing Congress from diminishing the salary of justices in office. The court should be given complete financial independence, however, by having control of its own budget and being able to draw directly upon the treasury of the United States. If only for reasons of expediency in procuring the adoption of the amendment, it probably will be necessary to fix a maximum, and in view of currency fluctuations it probably will be necessary to fix this by a ratio with some other governmental outlay. The amendment should reserve to congress the right to increase the court appropriation above such maximum. This question of financial independence was considered by a committee of the Association of the Bar of the City of New York during the crisis of 1937 but seems to have been forgot.

Place of Sessions. The court should have absolute control over the place of its own sessions. At present there is nothing in the constitution to prevent congress with presidential approval or over the presidential veto, from providing that the supreme court should meet on the summit of Pike's Peak. A whimsical president with a perverted sense of humor might suggest that congress, in order to give the Supreme Court broad perspective, should locate its court room at the top of the Washington Monument, and, for reasons of economy, should discontinue the operation of the elevator.

Time of Sessions. The court should have absolute control over the time of its own sessions. This would prevent a repetition of what was done by the newly-elected Jeffersonian congress that took office in December 1801 when, fearful lest the supreme court should adjudge invalid the repeal by that congress of the federal circuit court act of 1801, passed by the preceding congress, it juggled the terms of the supreme court in such a way that an adjournment was forced for fourteen months, from December 1801 to February 1803.

General Methods of Administration. The court should have absolute control of its own procedure from beginning to end. For instance, there should be no question about congress having any power to say how many justices must vote in favor of a decision in order to make it the decision of the court. In fact, the court should not be obliged to announce its own vote unless it wishes to do so. The court should be empowered to enjoin secrecy of discussion and vote upon its own members, a question that never yet has arisen but that

conceivably might arise if a hostile president and senate placed upon that bench a member who would attempt to wreck the institution from within.

This outline is merely suggestive. The important thing now is to start the ball rolling and, so far as possible, to keep its movement non-partisan.

Federal Judicial System Nears End of Reform Program

Thomas W. Shelton's Dream Already Surpassed

"The test of any permanent institution is its ability to adapt itself promptly to changing conditions. Necessary improvements, as well as the rules themselves, should not be dependent upon legislative time, whim or lack of information, but they should be promptly made by the highest appellate court as occasion arises. The application of these basic principles is necessary to the preservation of a proper balance between the three departments of government."—*Thomas W. Shelton, Aug. 30, 1913.*

The annual conference of senior circuit judges, held during the first four days of October, 1940, was an historic event. There were present the senior judges of the ten circuits and the District of Columbia; the attorney general and solicitor general and their aides; the director of the administrative office of the United States courts, Henry P. Chandler; the assistant director, Elmer Whitehurst; the chief of the division of procedural studies and statistics, Will Shafroth; and members of the administrative staff. Chief Justice Hughes presided.

This significant gathering may be said to mark the end of one period in the history of the United States judiciary. It assuredly marks the beginning of a period that will fulfill ideals long cherished.

For the greater part, the deliberations of the conference centered on the report made by Director Chandler for the administrative office, a report comprising 130 pages in mimeograph form, which presented "the business of the courts" for the year ending June 30, 1940. It was ordered that this report be published as a public document and so made available to libraries, courts, schools and bar associations.

The proceedings of the four days conference make twenty-four pages of a small pamphlet. Readers are referred to the excellent summary of the proceedings of the conference which was published in the American Bar Association Journal for November, page 884, and commented upon editorially in the same number.

An outstanding feature of the conference report is the analysis of causes for delay in civil calendars. If delay occurs because a court has received a greater volume of cases than can possibly be dealt with there is an administrative problem which in virtually all instances may now be solved. Delay may be due to holding cases under advisement more than thirty days, the remedy for which is obvious once the fact is revealed. Or delay may be ascribed to the reference of cases to masters.

Without accurate analysis attempts to reduce delay are likely to fail. Consideration of all the factors leads to conclusions that suggest the appropriate remedies. The federal courts no longer constitute what William Howard Taft once called a "go-as-you-please system."

That there should have been discontent with the federal judicial system was, from the beginning, quite inevitable. The discontent, in truth, originated with the first justices. The history of attempts to develop, shape and improve the system is almost as old as the system itself. The part of this history of present significance may be said to begin with the conformity act of 1872. We may assume that the idea of conformity with state practice was insisted upon by practitioners. As a working system it was doomed to failure. Probably no system ever

lent itself more readily to the evils of litigating the record and adjudicating the rules. Conformity prevented a community of interest in procedural reform between judges in the same circuit, but in different states. It was a positive barrier to that judicial integration which now, with uniform rules and circuit conferences, is rapidly being acquired.

This reference to the present dramatic stage cannot be more than a thumbnail sketch of history, but the present generation may well be reminded of the beginning. It was because of Roscoe Pound's slashing analysis of defects in the administration of justice, when he addressed the American Bar Association in 1906,[1] that a special committee was created "to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation."

With a distinguished personnel the members assigned to this committee tackled valiantly some of the current heresies that had come to rule the minds of advocates and over-technical judges. These artificial obstructions to justice were analyzed in the annual reports of the committee, and rational practices were defended. Students turning to the reports from 1908 to 1918 will find many capable arguments which disclose practices now gone forever. Besides arguments the committee laid down principles adapted to meet the more serious of the common defects in all the courts, trial and appellate, state and federal.

Thomas Wall Shelton, of Norfolk, became a member of the American Bar Association in 1909. He found this committee well started, and serviceable to his mission of preaching a uniform trial procedure for all the federal courts, to become uniform (with good fortune) also in the state courts. In the 1913 convention he reported as chairman of a special committee of five on "uniform judicial procedure," saying that the last preceding convention had adopted a resolution "for a complete uniform system of law pleading in the federal and state courts, and that a system for use in the federal courts, and as a model, should be prepared and put into effect by the supreme court of the United States."[2] Further, that Senator Clayton had sponsored a bill, introduced by the chairmen of house and senate committees, but not reached for lack of time, which was attributed to the time devoted to the "impeachment of a federal judge." (Impeachment still implies a blocking of legislation.)

Chairman Shelton believed it possible to obtain prompt passage of an act to authorize the supreme court to sponsor a code of uniform rules of civil procedure. In the debate the recently adopted new equity rules were mildly criticized and strongly defended. The experience afforded by this instance of rule drafting was seen to require that the actual work should be done, not by the justices, but by qualified experts.

Shelton was able to say for the bill he favored that it had received support from President Wilson and his attorney general, and from ex-President Taft. Much more was heard from Mr. Taft in succeeding years. The 1914 proceedings[3] yield this quotation:

"With deference to a different opinion of many in this Association, my own judgment about the Shelton bill is that it is not quite radical enough. I think it ought to provide that all suits in the federal courts should be brought in one form of civil action, thus uniting cases in law and equity, and that then the supreme court should be authorized and directed to provide a simple procedure by rules of court. . ."

Thomas Shelton, the real hero in any account of the progress of the federal courts, did not live to see his idea victorious.[4] But Shelton himself was a victor in the realm of the intellect and the hero of the campaign. In three successive reports he was able to say that the Association bill had been passed in the house of representatives, but "had not been reached in the Senate." Just when he learned that Chairman Walsh of the senate judiciary committee had set all the legislative power of government against the measure which again and again was endorsed by the American Bar Association, nobody can say.

Thomas Shelton strove unceasingly for seventeen years and died suddenly at the height of his dynamic career. He gave all he had, and he conquered. If exclusive credit for the ultimate triumph of his ideal is withheld there remains the triumph of a great soul, a great

1. Jour. AJS 20:178.
2. ABA Report 38, p. 34 (1913).
3. ABA Report 39, p. 381, (1914).
4. "The Grant of the Rule-Making Power to the Supreme Court," by Prof. Edson R. Sunderland, 32 Mich. Law Rev., p. 1116 (June 1934).

champion of sound reasoning and of decent government.

If the conformity act had remained in force to this time there would still be a debt owing Thomas Shelton for his courage in showing up the curse of "senatorial privilege." The chairman of each senate committee, by adherence to a shameful tradition of long standing, is permitted to block the introduction of any bill that is to him personally obnoxious. Within their spheres these chairmen, for their own interests, exercise power hostile to liberal government, traitorous to our constitution.

Repeatedly Thomas Shelton polled the members of both chambers after an election, and found a substantial majority pledged to vote for procedural reform, if *permitted* to vote. But Senator Walsh was relentless, and not because he had cases in the federal courts. Probably he had ambitions beyond a senate chairmanship, and counted on the aid of lawyers not influenced by American Bar Association ideals.

The death of Thomas Shelton came when there was no Association member willing and qualified to continue the campaign. The darkest hour came about three years later, when, in March of 1933, Walsh was appointed to the office of attorney general. But a dawn quickly followed that darkest hour; the new attorney general lived but a few days. The President appointed to the vacancy Homer Cummings, who served for five eventful years.

To Cummings belongs the credit for reviving the Shelton bill, all but lost to memory during the years of economic distress and political upheaval.

The act of congress "delegating" rule-making power to the supreme court was dated June 19, 1934. It made possible one form of civil action for cases in equity and actions at law. The federal government had at last caught up with the more advanced states and with all other English speaking jurisdictions.[5] The success of the use of rule-making power is too recent to call for any comment.

William Howard Taft's acceptance of the need of courts for adequate supervision had been often expressed before a start was made in 1921 by securing for the federal system an act which created the conference of senior circuit judges. While the bill was pending in congress Chief Justice Taft, addressing the judicial section of the American Bar Association, spoke eloquently:

"Judges are men and are not so keenly charged with the duty of constant labor that the stimulus of an annual inquiry into what they are doing may not be helpful. With such mild visitation they are likely to cooperate much more readily in an organized effort to get rid of business and do justice than under the go-as-you-please system of our present federal judges, which has left unemployed in easy districts a good deal of the energy that may be now usefully applied elsewhere. . . . This executive principle of using all the judicial force at the points where most needed should be adopted *in every state*, and when adopted will offer a remedy to a great deal of the injustice by delay that now exists."

The annual conference of senior circuit judges was a necessary factor in developing the system now so much farther advanced. It provided an executive head in each circuit, required standardized statistical reporting, and afforded responsible consideration of all problems at the annual meeting, with representation also of the department of justice. Step by step under the guidance of two great chief justices the powers of administration were developed until it was possible to visualize a judicial "administrative office" to entirely relieve the department of justice of responsibility for the operation of the federal judicial system. The first report of that office may well be said to mark the beginning of a new era.

Meanwhile congress had authorized the drafting of rules in criminal cases for procedure following conviction and had been liberal in creating new judgeships. No person can say how long the system would have had to wait for Shelton's hope—uniform rules—if Homer Cummings had not acted. His interest in a perfected system resulted also in a number of minor improvements, chief of which were the juvenile delinquency act, the act authorizing the supreme court to make rules for criminal cases prior to verdict, and about twenty-five measures which largely extended the scope of federal activity in the matter of interstate crime; begun in 1935 and recently completed in five volumes is the *Attorney General's Survey of Release Procedures*, a repository of source material for years to come.

For the success of the movement to shift

5. Jour. AJS 18:5:134.

administrative controls from the department of justice to the judiciary General Cummings deserves a large share of the credit, with thanks also to the chairmen of the senate and house judiciary committees, Senator Ashurst and Representative Sumners. For the head of a government department to relinquish voluntarily any source of power is a notable thing.

The conference of senior circuit judges must be considered an absolutely essential factor in the system as it now stands. The annual conferences in the circuits are at least indispensable. The variety of needs that they serve has become obvious in this present year. The development of this meeting of trial and appellate judges was merely a reasonable reaction to the disintegration that formerly existed. It is a strange fact that the pioneers in the movement lacked the evangelistic instinct. More than a decade ago beginnings were made in the sixth and eighth circuits; for nine consecutive years before the circuit conference was a statutory factor there were such gatherings in the fourth circuit. It was Judge John J. Parker, chief judge of that circuit, who fully developed the possibility of the conference, and finally informed the profession through the ABA Journal and by an address at the Judicature Society's meeting in 1939. Circuit and district judges, law schools and bar association officers, conduct what Judge Parker has well called a "school of jurisprudence." "They provide," he said, "the means of unifying the federal judiciary and of enabling the judges to solve for themselves the problems of administrative and procedural reform which confront them. Judicial independence cannot exist without judicial responsibility. The judicial conference is the democratic way for bench and bar to meet that responsibility."[6]

What remains? Less remains than what has been done. One thinks first of Hatton Sumners' bill to provide a procedure more workable than impeachment as a means for ascertaining whether a judge under formal accusation should be removed from office. The emphatic approval given to the principle of a judicial determination of charges against judges, by the assembly in the recent meeting of the American Bar Association, by the house of delegates in the same week, and later by the conference of senior circuit judges, justifies an expectation that in effective form Representative Sumners' bill will become law. Twice in past years it was approved by an ABA committee, in principle, and with the suggestion that the tribunal be one of seven judges, rather than three.

While there are doubtless many lawyers who believe, as did the entire bar for a century, that the constitution permits removal of a judge only by impeachment, there should be none who would maintain that impeachment is a sensible, workable or just mode of procedure. In view of the fact that trial to a bench would afford protection needed by a worthy judge, would be more certain to protect public rights, and is not in any positive terms forbidden in the constitution, the only way to proceed is to enact such a law as Sumners proposes, and have its constitutionality tested under declaratory judgment procedure.

There can be no doubt that before long the supreme court will have a committee at work on rules of criminal procedure. Here the model act of the American Law Institute will greatly assist.

The conference of senior circuit judges has approved the principle of public defenders, and it should not be difficult, with the considerable experience had in state courts, to adapt the system without extravagant expenditure. Properly applied the public defender's services will save money for the government.

These possibilities for the future are on the hither side of the horizon of 1940. But beyond these is the need for bolstering the mode of selecting judges for appointment. There are now so many judges that there may be as many as ten vacancies in the average year.[7] The temptation to trade judgeships for votes in congress, and the difficulty of determining qualifications, prevent any observer of the system of appointment from calling it perfect. Worse, probably, is the power of a senator to muster all the votes of his party against administration measures if such a senator insists on the appointment of a political henchman.

Until recently the problem thus hastily outlined has appeared to be beyond solution. The power to appoint is vested in the president and

6. Jour. AJS 23:5, l.c. 10.

7. According to a newspaper editorial published Nov. 12, 1940, 36 of the 56 federal circuit judges, and 79 of the 161 district judges were appointed in less than eight years. Some of these appointments were due to an increase in the force.

senate. No better plan has been proposed, nor is there any prospect that another method could be acquired even though it were accepted as better.

There remains then only one line of effort at present conceivable. That line relies upon the development of interest and influence by the organized bar, together with the development of popular confidence in the profession. Is it not probable that the bar will before long devote some effort to the appraisal of usable talent? Evidence of popular support for bar ideals in respect to judicial selection and tenure is published in this issue. Missouri has achieved, through popular support of a bar program, a vastly improved mode of selecting judges and protecting their tenure. In a dozen other states the bar associations are committed to similar plans that require constitutional amendment.

John H. Wigmore's proposal involves much less effort than amending a constitution. As set forth in this JOURNAL[8] there would be in every state, under bar regulation, two *Eligible Rolls of Judicial Honor*, one containing the names of two preferred candidates for appointment to the federal supreme court, the other containing four names preferred for the state supreme court. This brief article is probably one of the most important ever published in the JOURNAL. The principle is that lawyers will choose able men as theoretical candidates, that the press will cooperate, and that sentiment will be developed to educate presidents and governors who appoint judges, and to protect those presidents and governors from political scheming.

To this writer it seems that, under American Bar Association influence, the state bars might be inducted to set up such rolls of honor, and that the appointing power, whether local or federal, whether for a vacancy in a supreme court or in a trial court, would have available all the names on either roll, and would be strongly disposed to escape political harassment by choosing a candidate certain to be favored by majority bar opinion.

Until we have such rolls of judicial honor there will be no means of knowing in advance all who are willing to be appointed to the bench. Those first to exhibit willingness—the self-starters—do not ever constitute the entire number of potential candidates.

8. Jour. AJS 22:207.

Necessary improvement, as well as the rules themselves, should not be dependent upon legislative time, whim or lack of information, but they should be promptly made by the highest appellate court as occasion arises. The application of these basic principles is necessary to the preservation of a proper balance between the three departments of government.—*Thomas W. Shelton (1913).*

There need not be exact justice to support a democracy, but there must be an organized, united and constant effort to obtain as near exact justice as human institutions will permit. The law need not be certain and definite, but it may not be so uncertain and doubtful as to confirm suspicion of its ineffectiveness. The law may lag but it must find a proper tempo that will keep it immediately behind progressive opinion and scientific progress. The law may be inefficient, but it must promote liberty, equality and the forms and substance of justice; else democracy, notoriously inefficient, cannot compete with autocracy; which offers at least a temporary material efficiency.—*Percival E. Jackson, in Look at the Law, p. 341.*

The Charge to the Jury*

BY MORRIS A. SOPER, J.†

"I adhere wholeheartedly to the view that the trial judges constitute the most important body of men in this country for the maintenance of the impartial administration of justice. I do not except the Supreme Court itself."

The atmosphere of a federal court room during a jury trial is one of partisanship conflict, until the judge sums up at the end. He may intervene from time to time during the trial to see fair play; but the play is a combat between the lawyers as contestants, and the judge is little more than an umpire or referee. Finally the moment arrives when the champions have done all that they can for their respective sides, and the jurors straighten up in their seats, conscious that the period of observation is past and the responsibility of decision is descending upon them. Then the judge speaks as the representative of the law and its authorized expositor; he speaks, and for the first time in the trial the conflict is stilled, and every one is aware that an impartial official, the one unbiased person in the court room best qualified to pass judgment, is striving to sort out the tangled skeins of controversy and simplify the issues, so that the jury may pass upon them with understanding. This is the most important function that the judge has to perform in a jury trial, and one of the most difficult in the whole range of his judicial duties. Moreover, it is one of the most dramatic, since it is a manifestation of justice in action, and its adequate performance not only gives direction to the instant trial, but produces upon the listening public a deep impression of the dignity and security afforded by the fair administration of the law under our form of government.

Unfortunately, the natural guardians of the law, the lawyers themselves, in many parts of the United States, have not encouraged the development of this function of the judge, but on the contrary have gone a long way to minimize, if not to destroy it. The states in the fourth judicial circuit, all of them in varying degrees, have joined in this backward movement. [*Editor's note:* At this point Judge Soper related the experience of the several states in the fourth circuit. In South Carolina the constitution was amended in 1868 and again in 1895 to deprive judges of power to make any reference to the testimony. That power before 1868 had been the same as in the federal courts. While South Carolina appeared to act reluctantly, three other states preceded her. In Maryland the judge, unless requested, is not obliged to instruct the jury at all, and is forbidden under any circumstances to sum up or comment upon the evidence. (Notes 1, 2 and 3.) In Virginia[4] and West Virginia[5] the practice is not materially different. North Carolina has retained a portion of the historic power of the judge to charge a jury. The statute of 1796 authorizes the judge to "state in a plain and correct manner the evidence given in the case, and declare and explain the law thereon." It is his duty to present every substantial and essential feature of the case embraced within the issues and arising upon the evidence, and this without special prayer to that effect.[6] He should also instruct the jury on the inferences to be drawn from the facts,[7] but the credibility, weight and sufficiency of the evidence is entirely for the jury, and the judge is not allowed to intimate an opinion.[8]]

*An address delivered before the Judicial Conference of the Fourth Circuit, at Asheville, N. C. on June 21, 1940.

†The author is a member of the United States Circuit Court, Fourth Circuit.

1. 31 Md. State Bar Ass'n. 120, 128 (1926).
2. 42 Md. State Bar Ass'n. 72, 87 (1937).
3. Dairy Co. v. Brown, 169 Md. 257, 268.
4. Va. Seaboard R. v. Bowder, 144 Va. 154, 166; Matthews, Instructions to Juries, 7 Va. Law Reg. 521, 523.
5. W. Va. Code, 1937, Sec. 5653; The Problem of Jury Instructions, 43 W. Va. Quar. 1; Nicholas v. Kershner, 20 W. Va. 251, 263.
6. Graded School District v. Alamance County, 211 N. C. 213, 226; State v. Boyle, 104 N. C. 800.
7. Wilson v. Wilson, 190 N. C. 819, 821.
8. Marcom v. Adams, 122 N. C. 222.

Thus it appears that in the greater part of the circuit, the state judge is strictly held down to a system of written prayers or instructions, usually prepared by counsel, which the judge may grant, refuse or modify in writing; and as these prayers, when offered, contain conflicting hypothetical statements of fact and conflicting views of the law, they tend to become technical and artificial, and give little aid to the jury even when legally correct; but they afford opportunity for the judge to make some reversible error, and thus fulfill the fervent hopes of counsel on the weaker side. The judge could, if he were permitted, outline the issues of fact to be decided and explain the applicable rules of law to the jury in simple terms; but his mouth is closed by the rule. The result frequently is, as eminent writers have pointed out,[9] that the juries pay scant attention to the type of instruction commonly given and that the method tends to prolong litigation, provoke reversals and postpone the ultimate decision of the case.

In any other gathering than one like this, it might be useful to inquire why a system so faulty was adopted in the first place and is still tolerated today. We already know the answers customarily given. Summarily stated they are twofold: (1) the incompetence of the judges, and (2) the sturdy independence of the practicing lawyer and his unlimited confidence in his capacity to see that justice is done to his client without assistance or interference from any source whatsoever.

These answers have never been entirely convincing. I should be inclined to admit the incompetence of the judges were it not that I recall that all, or nearly all of them, have been practicing lawyers themselves. It is hard to understand how these splendid creatures can lose the capacity for reasoned thought and lucid utterance merely by taking the judicial oath. I should also be willing to admit that many of the abler members of the bar prefer the joys of private practice, leaving the bench to be occupied by men of lesser stature. But after twenty-five years upon the bench, years of more or less patient attention to the arguments of the bar in Maryland and in the fourth circuit at large, I have come to this conclusion: the lawyers are unquestionably superior to the judges in their ability to make bad cases look good; but in the search for the ultimate truth, whatever it may be and whomsoever it may hurt, the judges have developed a skill which the advocates have not yet chosen to emulate.

9. Morgan in 47 Harvard Law Review 59. Farley in 42 Yale Law Review 194, 213, 214.

SEARCH FOR THE ULTIMATE TRUTH

The conclusion is that the judicial bonds should be loosened and the presiding judge in a jury trial should be permitted to resume his historic role. It is gratifying to know that leaders of the bar concur in this opinion. At the meeting of the members of the American Law Institute in Washington on May 16, 1940, a tentative draft of a code of evidence was adopted which covered this subject in rule 10 as follows:

"After the close of the evidence and arguments of counsel the judge may sum up the evidence and comment to the jury upon the weight of the evidence and the credibility of the witnesses, if he instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses."

This provision provoked some debate, and as usual there were those who indignantly declared that they did not want any judge interfering in their business. They manifested complete confidence, doubtless well justified in some instances, that if the judge would only keep his hands off, they would not have any trouble in attending to their opponents on the other side; but the great majority of the members of the Institute seemed to be more interested in the triumph of justice than in forensic success, and voted in favor of the rule. The same conclusion was reached at the meeting of the American Bar Association in 1938 when the house of delegates approved the recommendation of the judicial section "that the common law concept of the function and authority of the trial judge be uniformly restored in the states which have departed therefrom," and that the trial judge should instruct the jury orally as to the law of the case and should have the power to advise them as to the facts by summarizing and analyzing the evidence, and commenting upon the weight and credibility of the evidence or upon any part of it, always leaving the final decision on questions of fact to the jury."[10]

10. 63 Am. B. A. Reports 523. (1938.)

Lest it seem that these are outside agencies not familiar with the local conditions in this circuit, let me remind you that John J. Parker, senior circuit judge for the fourth circuit, was the chairman of the judicial section of the American Bar Association in 1938, and that the report and recommendations on trial practice adopted by the Association were prepared by W. Calvin Chesnut, United States district judge for Maryland.

THREE DOMINANT VALUES

These conclusions are based on certain advantages of the system upon which there is general agreement. The most notable are: (1) it saves time and expense in reducing the number of disagreements and the number of new trials granted for error by the trial judge; (2) it induces the judge to give closer attention to the incidents and development of a trial until it is ended, and prevents him from becoming comparatively indifferent early in the trial after he has exhausted the human interest in the facts and grasped the main outlines of the legal situation; (3) most important, it gives the jury the benefit of the experience and wisdom of a trained and impartial lawyer, and affords them a clear presentation of the issues of fact and law, couched in simple and understandable terms.

The inquiry may have arisen in your minds as to why it has seemed desirable to present an outline of the state and federal practice, and to urge the greater value of the latter, when it is already firmly established in the federal courts by controlling decisions. The reason is twofold: (1) Some of the judges in this circuit do not use the federal method to the full in their charges to the jury, that is to say, they do not fully perform their function in this respect; and (2) it is believed that the experience of North and South Carolina state judges in stating the facts in their charges to the jury may prove of some value to the federal judges and aid them in avoiding the difficulties which the state practice presents. It is quite natural that a lawyer trained in the practice of his state courts should pursue similar methods when he takes a place on the federal bench. He is familiar with the local practice and realizes that it is probably preferred by a majority of his former associates at the state bar. So we find in the federal courts in this circuit that the judge more or less frequently refrains from summarizing and commenting upon the facts, and confines himself to general statements of the duties of a juror, and to charges on the law framed in the language of the prayers offered by the attorneys.

JUDGE'S DUTY TO COMMENT

It is a main purpose of this paper to suggest that the trial judge in this circuit should comment upon the facts in his charge to the jury. He should define the disputed issues of fact, summarize the evidence bearing upon them, and point out the inferences that may fairly be drawn therefrom. In this process he will arrange the essential facts in their logical sequence apart from those which are likely to confuse and mislead, and will draw attention to their application to the important points in the case. To put it in the words of 1 Starkie on Evidence, p. 440, he will endeavor "to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration which might otherwise embarrass or mislead a jury; and to do this, in a manner suited to the comprehension and understanding of an ordinary jury."

Of course the trial judge ought not to try to force or to persuade the jury to adopt his views. He has indeed the legal right to express an opinion, but it is a right that should be used sparingly, if at all. Let the facts speak for themselves; and if the statement of them involves in some measure an indication of the judge's own views, let his power to express an opinion be used to prevent an unnecessary reversal of the judgment by the appellate court. Thus the benefits of the system now used in North Carolina and formerly used in South Carolina will be attained; and its dangers will be avoided. Always the ultimate power and duty of the jury to determine for themselves the weight and credibility of the evidence should be stressed, and the judge should never forget the quality of impartiality which graces, while it strengthens, the authority of the bench. The proper limitation upon the established practice was described by Chief Justice Hughes

in Querca v. United States, 289 U. S. 466, 470, when he said:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and his lightest word or intimation is received with deference, and may prove controlling. This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'"

As Lord Bacon quaintly put it in his advice to trial judges in regard to summing up cases to a jury, "you should be a light to open their eyes, but not a guide to lead them by the noses."[11]

When it comes to instructions on the law it should not be difficult for an experienced judge in stating the applicable rules to improve on the prayers prepared by the attorneys in the case. No reflection upon the ability and good intentions of the lawyers is intended by this statement. A high order of technical ability is required to draw a correct instruction that will stand up in an appellate court, as most lawyers to their sorrow have discovered. But it is manifest that it is impossible for counsel engaged in a contested trial to do anything impartial; that is not their concern; and the result is that the instructions which they prepare are as onesided as it is possible to make them. Accordingly they are not always easy for an experienced lawyer to analyze and understand; much less so for a jury even when, as is the custom in the state courts of Maryland, they are marked as plaintiff's or defendant's prayers respectively. When they are inserted in the judge's charge as separate paragraphs, without anything to show their origin,[12] as sometimes happens in the federal courts in this circuit, a seemingly inconsistent patchwork of fact and law is submitted to the jury.

Conceivably, a jury of unusual intellectual capacity by close study and analysis of the prayers prayed by counsel could apply the rules of law to the facts as seen by one side and then to the facts as seen by the other. But it is urged that this is a task which the judge himself should perform; and it is best done when the judge, having received and studied the instructions furnished by the lawyers, frees himself from the precise terms which they have employed and uses the material as the basis of a consistent statement of the applicable rules of law, simply expressed; and then explains that the final result depends upon whether the jury accept the plaintiff's or defendant's version of the facts. It is believed that the result will be that the jury will get a better understanding of their duties, that they will render fewer erroneous verdicts, and that the appellate courts will more readily overlook technical mistakes made by the judge and more liberally apply the rule of prejudicial error.

I adhere wholeheartedly to the view that the trial judges constitute the most important body of men in this country for the maintenance of the impartial administration of justice. I do not except the supreme court itself. For that tribunal has no contact with litigants, exercises little power in the decision of controversial issues of fact, and performs its most conspicuous function in the enunciation of policies that fluctuate with the times and with a changing membership. The principles which underlie the administration of justice, on the other hand, never change. They are immutable, and must govern and control all men who sit in judgment upon their fellows, by whatever name that they be called; and these triers of fact must not only be endowed with power; they must be clothed with an independence and a tenure of office, so firmly established that they will strive not merely to reach a desired end, but to find the truth and to do justice in the traditional Anglo-Saxon way. The responsibility of the United States district judges to perform their

11. Quoted in Norris v. Clinkscales, 47 S. C. 488, 510.

12. Under the West Virginia law, Code 1937, §§ 5653 to 5656, it is provided that the instructions shall be incorporated in the judge's charge and read to the jury without disclosing which party offered them.

functions in the most effective manner in these times is unusually heavy, and their opportunity is correspondingly clear. Let them present so fair a picture of even handed justice that all men will recognize its beauty, and perceive that the impatient and partisan settling of disputes is as grave and reactionary an offense against the public interest in America today as it was solemnly declared to be in England in the ancient days of King John.

Legislative Regulation of Procedure Not Unconstitutional

BY CHARLES A. BEARDSLEY

In the October JOURNAL (pages 70-71), John H. Wigmore asserts that "all legislative rules of judiciary procedure are void constitutionally"; he says that "it is high time to raise" this "constitutional question"; he expresses the fervent hope that "some courageous counsel" will "take an early opportunity" to raise this constitutional question. And he undertakes to support his thesis on the basis both of "legal logic" and of "practical policy."

Dean Wigmore is well known to our generation of the American legal profession as one of its really great members. His contributions to the science of jurisprudence have been numerous and outstanding; and his opinions are entitled to be received with great respect. In this instance, however, I am unable to agree with him, either on the basis of "legal logic" or on the basis of "practical policy." I shall briefly state the reasons for my disagreement.

I. LEGAL LOGIC

The problem is one of constitutional construction—a problem relating to the *intention* of those who framed and adopted the Constitution, since the constitution is the only grant of *any* power to either of these two departments, and consequently the only justification for the exercise of any power by either of these two departments. Obviously, that intention is disclosed primarily, if not solely, by what the framers *said* in the constitution.

The constitution framers said different things in the different constitutions. But there appears to be a common governmental theory evidenced in all or in most of them. Dean Wigmore discusses what was said by the framers of the Illinois constitution; and, for the purposes of this discussion, what they said may be taken as being typical.

The framers of the Illinois constitution *said* exactly *nothing* about regulation of court procedure by the courts. But they *did say* that the general assembly (legislature) should not "pass any *local or special* laws . . . regulating the practice in courts of justice." The *"expressio unius"* maxim is all but universally recognized as an aid in ascertaining the intention of the parties to any document. If it were here applied it would lead inevitably to the conclusion that the framers intended that the general assembly *should* regulate "the practice in courts of justice," but only by laws that were *not* "local or special." And this is not all that they said on this subject; they said that "all *laws* relating to courts shall be general and of uniform operation," and that the *"practice* of all courts of the same class or grade, *so far as regulated by law* . . . shall be uniform."

Dean Wigmore quotes these things that were *said* by the framers of the Illinois constitution; but he sees in them no evidence that they *intended* that court practice should be regulated by the general assembly.

He says that, when they *said* that court practice should be "regulated by law," they did not *mean* "law" enacted by the general assembly, because "of course the word 'law' includes judicial law as well as legislative law"! Dean Wigmore's "of course" that, when the framers of the Illinois constitution wrote about the *enactment of laws*, they meant to refer to laws *enacted by the courts*, appears to me to be singularly lacking in persuasiveness.

He would not apply the *"expressio unius"* maxim to what they said about the general assembly "regulating the practice in courts of justice" by "any local or special laws", because this would involve "implication," and "implication does not help." And why is it that he thinks that "implication does not help"? Because the power to regulate court procedure

belongs to the judicial department, and the constitution framers said that no department should exercise another department's power, except as "hereinafter *expressly* directed." And who *said* that the power to regulate court procedure is the judicial department's power? The framers of the constitution did not say so. Nothing that they *said* even suggests that any such thought ever entered their minds. But they did say at least two things—noted above—that sound very much like statements evidencing their intention that this power should be the legislative department's power.

Dean Wigmore does not purport to ascertain the intention of the framers of the constitution from anything they *said,* but wholly *in spite of* what they said. He appears to attempt to justify his rejection of what they *said,* by assuming that they must have *meant* that the court should regulate court procedure. Why he thinks they must have meant that, is not entirely clear. But it is strongly suggested in his article that the only reason is that he has a fixed belief that the court procedure is the *court's* procedure, in the sense that it belongs to the court, and is the particular, if not the sole, concern of the court or of the judges. Thus, he refers to the power of all courts "to regulate *their own* procedure" and to the power of the court to regulate "*its* proceedings"; and he refers to regulation of procedure "*for* the judiciary."

I have a somewhat different conception of the place of the courts in our constitutional system. I conceive of the courts as being not only created by the people, but created for and belonging to the people—not for or to the courts or the judges.

I conceive of the courts as instrumentalities created by the people for one purpose—and only for one purpose, namely, to adjudicate—to settle by peaceful means—disputes between members of society, and between a member of society and his government. The people have never surrendered, to anybody or to anything, their right to take their disputes to their courts, and to have them there settled.

Court procedure consists (1) of the right to take a dispute to the particular court for adjudication, (2) of the method by which that right may be exercised, and (3) of the method by which that dispute may be presented to and heard by that court. The procedure is not the *court's* procedure; it is the *people's* procedure. Otherwise, the courts are the masters, not the servants, of the people.

I am unable, therefore, to agree with Dean Wigmore's thesis that, when the people created the courts as their servants, the people thereby by n e c e s s a r y—or permissible—implication granted to their servants the right to regulate, and to restrict, and even to deny, the right of the people to be served by their servants.

II. PRACTICAL POLICY

From the standpoint of practical policy, there appears to me to be two very good reasons why doubt if any, in reference to whether the legislative department or the judicial department is granted the power to legislate in reference to court procedure, should not be resolved in favor of the assumption of that power by the judicial department, either as a result of the urgings of "courageous counsel" or otherwise.

In the first place, legislation may, and ordinarily does, involve questions of public policy, and of controversy; and this is true of legislation in reference to the courts, as well as of legislation in reference to other subject-matters. The legislatures—not the courts—should be the policy-making branches of the government. And the courts will be the better able to perform their necessary judicial functions, if and when they are kept apart, as far as possible from matters of public controversy. The evils incident to the combination in one group of men of the power to make the law and of the power to construe and to apply the law, are as real if those men are called "judges" as they are if those men are called "bureaucrats." The courts will be able to serve the people best, if and when they limit themselves to ascertaining the facts, and to construing and applying the law as made by the law-making departments of the governments.

In the second place, the courts should be slow to assume power, in cases of reasonable doubt, because under our system of government there is no instrumentality provided for testing by orderly means the right of the courts to exercise a particular power. If either the legislative department or the executive department undertakes to exercise power not granted by the constitution, the courts can check, and do check, such unauthorized exercise of power. But, if

the courts grasp ungranted power, the people have no redress—except by revolution. Because of this circumstance, the courts have a very grave responsibility of *self*-restraint. And the bar has an equally grave responsibility to encourage the courts to exercise such *self*-restraint.

In his discussion of the "practical policy" of declaring unconstitutional all statutes regulating court procedure, Dean Wigmore rests his case solely upon the claim that the courts can do a better job of regulating court procedure than can the legislatures. This is like the usual argument in favor of the exercise by administrative tribunals of the unrestricted power to make the law as well as to apply it. It is an argument as to which "much may be"—and has been—"said on both sides." Even if it were conceded that, as Dean Wigmore, argues, the courts can do a better job, this should be given little if any weight as an aid to constitutional construction. Under *our* form of government, happily, super-efficiency is not necessary to constitutionality.

Ideal Selection Plan Wins in Maryland Election

That it is not impossible to amend a state constitution in order to benefit a municipal court has been most convincingly demonstrated in Maryland. An overwhelming majority of voters have declared for important reforms in the People's Court of Baltimore. The amendment thus approved guarantees continued good service in this recently reconstructed court, and also enables any other municipality to establish a similar court.

Lawyers in other states may not feel concerned about the complete success of the movement of the Baltimore bar and citizens' organizations to modernize this court held in shackles by statutes and the constitution, but all progressive lawyers should learn that it is possible, with the aid of lay bodies, to educate the public and to win a reform in the teeth of "public servants" who fight for the status quo. Those who are interested will find the history of the reform briefly told in earlier numbers of the JOURNAL (22:131, 23:84, 24:62).

The work of a strong bar committee headed by Reuben Oppenheimer laid bare the manifold defects in the law, and under Governor Herbert O'Conor's administration sweeping reforms were made, not only for this court, but for all the local courts of small jurisdiction in the state. Finally the constitution had to be amended to insure the retaining of three able judges, Allan W. Rynehart (chief), William T. Tippet and Joseph T. Parr, by changing their tenure from two years to eight years, with the privilege also of "running on their records" when the election is held. The amendment also permits of reducing the staff of constables from fifty-one to fourteen and of placing constables and clerks under a merit system. Baltimore will benefit in ways too many to be estimated now, and especially in being able to employ competent judges and competent staff members, and banish politics.

The prospects for success looked none too good notwithstanding the fine campaign that had been waged. The ballot carried seven constitutional amendments and two state-wide referenda, with four additional problems for Baltimore City voters. In the city the amendment received a majority of about 75,000 votes, which was substantially increased by the out of town votes.

But the interest of the voters had been aroused through the efforts of committees, newspapers and individuals throughout the state. The efforts of the central committee were spread over several months and toward the end the service of radio, billboards and movie houses were enlisted. "While we had the endorsement of the state political leaders of both parties, the majority of smaller professional politicians were, of course, against us because of the loss of patronage involved in the amendment, and there was definite, organized opposition." In other words, there was present the usual bitter opposition to any reform calculated to reduce the field for spoilsmen. It was unfortunate that professional

dealers in offices and votes were able to quote some lawyers who preferred to have judges subjected to competition at the polls. These lawyers were overwhelmingly defeated in their attempt to induce the bar association to rescind its approval.

The friends of grass-root reforms in administering justice would do well, before completing their plans, to learn all about the Maryland campaign, from its inception about three years ago. The articles in the JOURNAL, cited above, present only the more essential data.

Missouri Voters Approve Judicial Selection Amendment

With a majority of 100,000 votes, the Missouri non-partisan court plan was approved by the voters of that state in the November election, and goes into effect on December 5, thirty days after the election.

Election statistics available ten days after the election emphasizes the extent and significance of the victory. With returns in from 3,847 of the state's 4,479 precincts, the vote was: Yes, 488,759; No, 388,826. This was the only proposal the voters accepted; six others were defeated, most of them by large majorities. It got its greatest support in the metropolitan centers where it will take immediate local effect. Jackson County (Kansas City) gave it a 35,000 majority; St. Louis County, 36,000; and St. Louis city, 83,000.

Thus ends triumphantly a campaign that has been under way since the creation about four years ago of a special committee of the Bar Association of St. Louis on judicial selection and tenure. Progress of the movement may be traced through the pages of this JOURNAL. (21:145, 22:248, 23:205, 24:64). The committee's exceptionally able study of the subject led to recommendations in its 1937 report which formed the foundation of the plan as approved by the Missouri Bar Association in 1939 and now lodged in the state constitution.

After unsuccessful attempts to get the measure through the legislature in the normal way, it was determined to initiate it in the 1940 election. The campaign for that purpose was undertaken by the Missouri Institute for the Administration of Justice, a citizens' organization representing all forces, lay and legal, interested in furthering judicial reform. A spirited campaign brought victory on the same ballot on which other proposals met overwhelming defeat.

In brief, the plan provides for the filling of vacancies in judgeships by appointment from a panel nominated by a non-partisan commission, and for the continuation of such judges in office by vote of the people on a non-competitive ballot. For the present, it applies only to the supreme court, the three appellate courts, and the circuit and probate courts of St. Louis and Kansas City. It may be adopted in any other judicial circuit at any time by vote of the people.

The amendment establishes two kinds of non-partisan, non-salaried commissions for nominating judicial candidates. The appellate judicial commission, for the supreme and appellate courts, will consist of seven members, including the chief justice of the supreme court and one lawyer and one layman from each of the three appellate districts. The lawyers are to be elected by the members of the bar of the appellate districts, and the laymen are to be appointed by the governor. Circuit judicial commissions, for each circuit in which the plan operates, are to consist of five members, including the presiding judge of the appropriate court of appeals, two lawyers elected by the local bar, and two laymen appointed by the governor.

A judge is appointed to fill a vacancy by the governor from a list of three candidates nominated by the commission. After a trial period of at least twelve months, he must, to be retained in office, be confirmed by vote of the people. For that purpose his name will appear on a special non-partisan ballot reading as follows:

"Shall Judge ..... of the ..... court be retained in office? Yes ( ) No ( )"

If a majority of the voters vote against him, his term expires at end of the year, and a vacancy will then exist to be filled again by nomination and appointment. If the people vote to retain him he serves, unless removed for cause, for the full term of the office. No change is made in terms of office, and at the end of each term a judge must be voted on by the people. Campaigning or other political activity on the part of a judge is specifically forbidden.

"It seems to me definitely to remove all the objections to the appointive system and most of the objections to the elective system," said Justice Harlan F. Stone in a letter discussing the Missouri plan. These evils have been the subject of serious thinking by the legal profession for many years. New ideas recently advanced in Indiana and Pennsylvania are discussed elsewhere in this JOURNAL. It is unlikely that a perfect solution has been, or will be found. Missouri has every reason, however, to look forward to great improvement as a result of successful operation of its new plan, and other states should be preparing to adopt it subject to whatever modifications early Missouri experience may suggest.

New Proposals Facilitate Judicial Selection Reform

The Indiana judicial council, organized in 1935, has been very active in several lines, and of late has been preparing for progress in the field of judicial selection and tenure. While the text of an act has not been finally approved at the time this explanation is published, the work of drafting has opened up a most significant basis for discussion, and deserves wide publicity quite regardless of its future in Indiana. The JOURNAL is indebted to Mr. Charles W. Richards, Indianapolis, for information concerning the plan.

Briefly stated, the draft bill provides that candidates for judicial office in all courts from supreme to municipal shall be nominated only by the votes cast by lawyers in official bar primaries. The name of the incumbent judge shall appear on the primary ballot unless he is seventy years of age, or he renounces his right to candidacy; other candidates get a place on the ballot by petitions.

Unless the count of the primary vote places the incumbent lower than three other candidates, his name will appear on the election ballot, with the name of the one other candidate who received the highest number of votes.

The final election ballot thus submits to voters a choice between retaining the sitting judge or supplanting him by the bar's first choice; but in the event that the judge is disqualified by age, or renounces his privilege, or is not among the three candidates most preferred by the bar, then the names of the two lawyers receiving the highest primary vote will be submitted on the election ballot.

This system is seen to be very ingenious. The public interest is served if, at a lawyers' primary, the incumbent judge runs fourth and is eliminated. A judge held in such low esteem by the bar should have no chance for appeal to a constituency that is incapable of appraising his record and his qualities.

But if the incumbent judge gets third place in the primary he will run against the lawyers' first choice on election day. This plan gives the judge all he appears to be entitled to, and it gives the one other candidate as much opportunity to be elected as an opponent of an unpopular judge should need. The voters deserve a winnowing of potential candidates by the one group capable of judging judges, and this the voters get.

The proposed system is infinitely safer than the selection methods in vogue in Indiana and thirty-five other states, more certain to attract such talent as the legal profession may possess, more fair to the incumbent as to security of tenure than any existing elective plan, more favorable to the public than a method that involves the risk of losing an excellent judge, and

obliging voters to speculate on the quality of his opponent.

The plan calls for a special bar primary, but the cost will be slight and the lawyers will not complain that they are expected to serve in the manner provided.

Lawyers have always exerted a preponderant influence on the selection of elected judges. Lacking an official status the lawyer's influence is individual, sometimes selfish, and not always expert. The Indiana plan enables the profession as an entirety to advise the voters and to assist them in the first winnowing out of potential candidates. An open, public, official mode of taking bar opinion as to judicial candidates has always been much needed. In behalf of the states the profession has assumed collective responsibility for a large share of the administration of justice. In the remaining states the voluntary bar associations exert themselves to serve public interests to the best of their ability. The organized bar should everywhere be permitted to exercise at least the power of advising the public on matters within the profession's range of experience.

PENNSYLVANIA PLAN PROTECTS TENURE

A committee of the Pennsylvania Bar Association has vastly broadened the opportunity for getting elected judges "out of politics" by a simple method which was offered to the Association this year. The dominant idea is as simple as this—that any judge willing to serve an additional term, may give notice of this fact at least seventy days before primary elections are to be held, and *he shall then be the only candidate.* The voters will simply vote yes or no, on the question of continuing him in office.

The plan was presented in the form of a draft act in a "report of the committee on judicial council." This committee was created several years ago, and before it had succeeded with the plan for such a judicial advisory council as exists in a majority of the states, the supreme court created its "procedural rules committee," whose work has often been described in the JOURNAL. (21: 4: 101, 21: 6: 198, 22: 4: 158, 24: 1: 26) The rules committee has done most impressive work, and the supreme court, under authority delegated by the legislature, has improved administrative work in the trial courts. But the committee on judicial council is permitted to continue, doubtless because it receives no appropriation.

It will be seen that the proposal that an elected judge be permited to run "on his record" embodies much of the improved form of tenure presented to the American Bar Association in 1939. (A.B.A. Proc. 1939, p. 406)

So far as tenure is concerned this plan, of submitting the incumbent's name to the voters for decision as to continuance in office, is almost identical with the plan adopted in recent years by a number of progressive state bars. Heretofore, the discussions have coupled the indeterminate tenure with the other major proposal, that of substituting appointment in a restricted form for popular election. The Pennsylvania committee appears to be first in proposing reform as to tenure without altering the elective mode of selection.

Security of tenure, freeing judges from political importunities and temptations, has for centuries been considered vital to the life of judicature. The modes for removing unfit judges have been, in the main, impractical, and this means that judicial independence may be independence of established standards of performance. And to meet this difficulty the short term came into use.

The result we have seen a thousand times. Judicial terms involve uncertainty; judges are subjected to threats of defeat at the polls; the office of judge has become to some extent a hazardous calling.

The problem has been to provide a sensible, safe, practical way for retiring judges (some of whom have served well, but have outlived their usefulness) without making this service dangerous to incumbents. The best answer so far found is the submission of the judge's name at stated times to the people whom the judge serves. The plan is easily adoptable without making any change in respect to selection. A judge appointed to fill a vacancy must file a petition in order to become a candidate for a full term and must compete with other petitioners in the primary.

The act provides, most sensibly, that a fee must be paid by each of those seeking nomination in the primary (there being no incumbent judge who has declared his wish to continue in office) as a check on petitions which may repre-

sent advertising or something worse; for an appellate court $50, and for a trial court $35. When only the name of the incumbent judge appears on the ballot there is a space in which voters may write or paste the name of a qualified candidate. For the present purpose the main features suffice; in the pamphlet more than twelve pages of text are required.

Dissatisfaction with Piecemeal Reform

BY CHARLES E. CLARK*

IT SEEMS inevitable that sooner or later all proponents of measures for the reform of judicial administration must face the problem whether to accept a part of the loaf or to fight on for the full measure of reform without compromise. The suggestion of partial advance only is usually presented with persuasion by those who honestly feel that neither bench nor bar is prepared for a complete break with the past, and that moving forward a step at a time is easy and sure and perhaps even more productive in the long run. Often, too, the highest judicial officers of the state support such a course; for they are no more immune from at least some faint regrets for the system in which they have become expert than are successful practitioners.

Experience seems to show, however, that compromise measures of procedural reform are a mistake, that the slight gain is not worth the cost of the confusion entailed, and that the more adequate reform is actually delayed by the half-way steps. It seems the part of wisdom to refuse to make any change until a worth while system may be achieved. Naturally this rule does not apply to a procedural system already up to date which needs only the addition of some simple new device—pretrial procedure is an obvious example—to make it well-nigh perfect. But short of that it would seem to be a proper axiom for procedural reformers that the good of their own cause requires them to eschew piecemeal reform as the veritable kiss of death.

Perhaps the most striking example from experience is furnished by New York — that state where the good and the bad of procedural reform has always been so strikingly intermingled. In 1915, pursuant to statutory direction, the board of statutory consolidation, under the able leadership of Justice A. J. Rodenbeck, reported an effective short practice act with detailed rules of court of an advanced character. But the legislature would have none of this; its committee in 1919, reporting "the almost uniform general disapproval" by the bar of the Rodenbeck proposal, offered the hybrid which became the civil practice act, adopted in 1920 and effective in 1921. The State Bar Association, however, was generally favorable to the Rodenbeck reform and critical of the action of the legislature. Indeed, there was much sentiment in that body for condemning the new act outright and asking the governor for its veto in the hope that a more effective system could be secured in its place. Finally it was decided, however, to accept what was offered, with the idea of going forward from that point.

It must be admitted that later advance in New York has been at a snail's pace, as compared, for example, with the swift and thorough achievements in the federal system. The New York judicial council in recent years has struggled manfully in support of specific improvements, and has an honorable record in view of the obstacles with which it has had to contend. But even now there is no thoroughgoing rulemaking power in the state, and reforms must be sought from the legislature. One example is particularly instructive. Although the Rodenbeck board had supported the English system of complete freedom of joinder of both parties and causes, the legislature failed to perceive the interrelation of the two subjects. Consequently the civil practice act followed the English model on joinder of

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parties, but with respect to joinder of causes, it retained the old formal classes within which alone joinder could be had. When the matter came up for adjudication, the Court of Appeals held in 1925, in Ader v. Blau, 241 N. Y. 7, Judge Cardozo dissenting, that the joinder-of-causes restriction prevailed over the party-joinder authorization. Since the court also took a limited view of "cause of action," the result was largely to nullify the reform naturally to be expected from the new rules of party joinder. Although the decision was the subject of widespread criticism in the law reviews and became an argument for legislative change (see First Rep., N. Y. Judicial Council, 1935, p. 44; Moore's Federal Practice, pp. 153, 2116, 2180; 37 Col. L. Rev. 462; 32 Mich. L. Rev. 36; and 35 Yale L. J. 85), the legislature did not act until 1935, when it then adopted the rule for free joinder of causes, which should have been found in the act of 1920. And not until 1936 did it adopt the like rule of joinder of counterclaims. Here is a time lag of a decade and a half to correct an obvious mistake in only a corner of the field.

That the question is acute today is shown by the refusal already of some states to follow the complete reform of the new federal rules, notwithstanding the advocacy of such a course by advanced bar association groups. The matter seems now at issue in at least Colorado, Florida, Missouri, and Oregon. Arizona has been a model in showing how simply and effectively the federal rules may be adapted to state procedure. (See the article by Professor Sunderland in this JOURNAL for April, 1940.) On the other hand, it would seem that in South Dakota exactly the same mistake has been made as that made earlier in New York in adopting complete freedom of party joinder, together with the old restrictions on joinder of causes. Recent reform in Indiana has been most limited; while in Pennsylvania only now is there an approach to a *separate* revision of the equity rules. (See this JOURNAL for June, 1940.) And in Alabama the newly revised equity rules are supported by their draftsmen because they stem from ancient chancery practice and not from the new federal procedure.

On the other hand, the new federal procedure seems to afford a powerful argument against piecemeal reform. When the enabling act became effective in 1934 it was first proposed to initiate the lawyers into modern reform by new rules in actions at law only, with the hope that later on the proposed law rules and the existing equity rules might be combined. But arguments were presented showing that in many respects this would be a step backward, would be in truth a retreat from the already extensive union of law and equity then obtaining in the federal system. As is well known, the supreme court in 1935 decided to do a complete job; and the new procedure has become a part of the federal court system without a ripple of disturbance. The two experiences here recounted show that the direct and thorough is the best course.

South Dakota Judges Unite to Modernize Procedure

That the South Dakota State Bar received the award of the American Bar Association in 1939, for having performed a more significant job than any other state organization, is widely known. The job was inducing the legislature to appropriate a moderate sum so that a revision and compilation of state law could be made, a considerable amount of the technical work being performed voluntarily by lawyers and judges. (It should be said that the State Bar act makes every person licensed to practice law a member of the organization.)

Not only was this much needed and very difficult work done in a relatively short time, but there was also a revision of rules of civil procedure under a section of the act which delegated authority to the supreme court, and also recognized the court's inherent power to make rules of procedure and to amend future legislation that relates to procedure. The carrying out of this obligation to the state not only resulted in a modernized procedure, but did

much more in stimulating ambition on the part of both lawyers and judges. Doubtless something also should be credited to the recognition given by the American Bar Association. At any rate, the supreme court has taken the leadership in promoting the study of judicial administration. The first step was to summon all circuit judges to a conference held October 4 and to prepare a program through a committee that represented both trial and appellate benches.

There had never before been any conference of judges in the state's history. The conferring of the rule-making authority doubtless influenced the justices, for with power there must be also responsibility. The responsibility is to the people of the state.

The most interesting discussion, perhaps, was concerning the use of three circuit judges to hear motions for new trial and for judgment non obstante, and further for having a three-judge court to sit in certain trials in lieu of a jury.

The October number of this JOURNAL, with its article concerning a three judge court for hearing motions for new trial, written by Professor William W. Blume, was not available at the time this conference of judges was held. The same number contained a long argument on behalf of the use of three judges in lieu of jury, for certain cases, as is now provided in the Michigan practice. Every judge in South Dakota has received this number since the meeting.

The subject was well treated by the Honorable A. K. Gardner, a justice of the eighth circuit court of appeals, who had urged that motions for new trial should be decided by three trial judges many years ago, when the South Dakota supreme court had got far behind in its work. The proposal was not accepted; because the trial courts were also behind in their work. The use of commissioners to assist the supreme court was resorted to, and additional trial judges were provided.

The article in this JOURNAL in April, 1938, (21:6:213) concerning three-judge trials, was read at this meeting, and the October number, containing Professor Blume's important article concerning motions for new trial was later sent to all of the judges.

It appears to be well proved by letters from judges that this conference marks a stage in South Dakota's judicature far beyond the status that justified the American Bar Association award. The supreme court justices appear to be in entire agreement as to continuing the work of improving, not merely procedure, but administration generally. In this work it will have the assistance of a very capable judicial council and an ambitious bar.

The statute conferring rule-making power provides that the supreme court shall consider proposals for amendment or repeal of procedural rules submitted by any five practitioners, and shall set a day for argument twice each year. The first of these occasions fell on October 15. Some changes have been expected because there was not sufficient time between legislative sessions to organize and carry out a complete rules revision and follow through with criticisms and revisions.

It is not by the cases which catch the popular fancy that a valuation of our judicial and administrative work can be made. Of far greater interest and importance to the average citizen is what happens to his claim or his defense before the magistrate, trial court or administrator. At these points does the law come intimately into contact with the individual. It is here that day by day the average man's sense of justice will be outraged or satisfied. It is here that delay, technicalities, ineptitude and prejudice will take their greatest toll in confidence.—*William O. Douglas, J.*

Independent Judiciary Born in Colonial Virginia

BY NATHAN BOONE WILLIAMS*

With governments toppling hourly in the throes of world revolution; with our own peace and security sorely threatened; with our republican plan and concept under constant sabotage and attack, it seems timely to examine the roots of our system of a balanced triumvirate of legislative, judiciary and executive departments. We would discover how firmly one of these is embedded in the evolutionary history of our people; how it slowly grew in the rich soil of tested experience of the people of Colonial Virginia to mature in the fullness of time in the constitution of the United States in 1787.

The connected story appears never to have been told. This sketch is solely concerned with the development in Colonial Virginia of the idea of an independent judiciary. The colonial period properly closes with the year 1776. The years between 1776 and the writing of the federal constitution in 1787, and the setting up of the new government in 1789 were years of active war and civil turmoil; a period in which many thoughtful men turned to the experience of the colonies since the first English settlement at Jamestown, Virginia, in 1607.

The essentials of the Virginia plan as presented to the constitutional convention in 1787 was a government to consist of a supreme legislative, judicial, and executive system, each to be supreme in its particular field as marked out and determined by the provisions of a written constitution. This idea "became the bedrock of the Constitution."[1]

The delegates to that convention had before them the details of the system of government in their home commonwealths. A very few of these had already written constitutions adopted in 1776, while others had adopted constitutions previous to the meeting of the constitutional convention, and had acted upon the recommendation of the Continental Congress.

The weaknesses of the Confederation were apparent and a notable contribution to the idea of a national government had been published by Pelatiah Webster, February 16, 1783.[2] This is an extremely able paper. It is however, wholly unreasonable to surmise that this talented merchant was unfamiliar with the provisions of the constitution of Virginia adopted in 1776, and with the judicial system long in practice there.

The idea of an independent judiciary in colonial America dates to the year 1622, when the governor and council of the Colony of Virginia in order "to render justice more cheap and accessible" set up a system of inferior courts in the several counties of the Colony of Virginia.[3] These courts early became most influential bodies in the development of the Colony.

The first discovered use of the term "Countie Courts," as these local tribunals for the administration of justice were known, was in the year 1634.[4]

As new counties were created in the Colony, these "countie courts" were regularly established. They were at the height of their power and influence in the crucial year 1776. It was in that year, May 6, 1776, that the membership of the defunct House of Burgesses of Virginia, and others, assembled as a "convention" at Williamsburg, Virginia. This "convention" was a continuation of earlier "conventions," run-

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1. Meigs: *Growth of the Constitution,* Reprinted in Fed. Stats. Anno. Second Edition, v. 10, pp. 86-266.
2. Senate Document 787, 62d Congress, 2d Session (1912) *The Real Authorship of the Constitution of the United States explained,* by Hannis Taylor. This document contains a reprint of the pamphlet of Pelatiah Webster.
3. Stith: *History of Virginia* (1747)
4. Henning: *Statutes of Virginia,* vol. 1, pp. 272-3.

ning back to 1774, and had been easing its way into control of the affairs of the Colony of Virginia.

This "Convention" of May 6, 1776, took over governmental control of the Colony of Virginia with solemn speed and daring determination. It immediately proceeded with the fundamental problem of setting up a new commonwealth. It was in continuous session from May 6, 1776 to June 29, 1776, when having given final approval to a new constitution for the Colony of Virginia, it elected Patrick Henry governor. This new constitution was to serve the people of that State for more than fifty years.[5]

This "Convention" wrote and adopted on June 12, 1776, a bill of rights, which it included in the constitution, which bill of rights is the basis and contains most of the historic phrases of the Declaration of Independence promulgated by the Continental Congress of July 4, 1776.[5]

So embedded in the experience and affections of the people of the Colony of Virginia was its long established system of county courts that no proposal to change that system was made in this "Convention." Only such minor changes were made as appeared necessary to effectuate properly the transfer from a Crown Colony to an independent Commonwealth.

The Virginia Constitution of 1776 contained the following:

"The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them; except that the justices of the county courts shall be eligible to either House of Assembly."

This exception not only indicates the high respect in which the justices of the county courts were held, but at the same time indicates the willingness of the "Convention" to recognize the wisdom of not foreclosing the doors of its legislative establishment to these honored and selected men, who, at times might be available to give of their experience and knowledge in the practical administration of the laws of the Commonwealth. Talented and experienced men in the administration of justice; men familiar with the principles of sound government were as scarce in colonial days as in the present.

In recognition of the growing needs of an expanding population, this constitution for the new Commonwealth of Virginia provided for appointing justices of the peace by the Governor, but provided that in case of vacancies, or increase in number, such appointments should be made on recommendation of the county courts of the respective counties. Sheriffs and coroners were to be nominated by these courts. The clerks of these courts were continued in office, but vacancies were to be filled by the respective county courts.

These "Countie Courts" from the beginning had been courts of comprehensive jurisdiction, both civil and criminal, save in capital cases. They were courts of probate handling all questions of wills, estates, guardianship, and many other matters. In all civil cases their decisions and judgments were final where the amount in controversy was of less value than twenty pounds, roughly $100.00. Causes which involved more than that sum were in Colonial days appealable to the general court. That court was composed of the governor as president, and the members of the governor's council. This general court held two terms a year and sat at Williamsburg, Virginia. Its decisions were final in cases involving five hundred pounds or less. Larger issues were appealable from this general court to the King in Council.

However, it was from the manner of the appointment, and from the continuity of membership of the justices of the "countie courts," there developed in the course of more than one hundred and fifty years of colonial Virginia history the idea, practice, and experience of an independent judiciary.

Independence was stimulated in that appointments to membership in these county courts was for life. It was further encouraged and developed by the practice that as the business of the court grew and additional members were required, or when vacancies occurred by death or resignation, these new members were named, or vacancies filled, upon the recommendation of the court itself. In the beginning, when the legislative body of the Colony determined upon the creation of a new county it provided for such court and left the appointment of justices in the first instance to the governor. It did not take many years, however, for these courts

5. *American Charters Constitutions and Organic Laws*, vol. 7, p. 3812, Government Printing Office, Washington, (1909).

to become distinctly independent in personnel; certainly not more than fifty years from the first appointments elapsed until the members of such courts had been selected and named by the court itself.

In colonial days in Virginia the royal governors seem to have been particularly careful to name worthy and well educated men to these judicial positions. These same men in the exercise of the prerogative of the county courts to name others for increased membership, or to fill vacancies, seem to have been zealous to select only capable and respected citizens of the county. Except on the creation of new counties, the governor soon lost all control over the personnel of their membership. These courts became self-perpetuating, in that their personnel was soon the selection and choice of the court itself, and from among men of the immediate community, and whose capacity and conduct the members of the court had long observed.

Our Federal Constitution followed this principle of tenure for the membership of the judicial department, during good behavior, which means for life, retirement, or impeachment. That was the exact principle of Colonial Virginia.

Except for the numerous occasions on which compromise was necessary in the progress of the constitutional convention of 1787, it is no far stretch of the imagination to visualize the independence of the judiciary being further buttressed by allowing it to recommend to the appointive power suitable persons to fill vacancies from which list appointments must be made, subject to confirmation as provided in the constitution of the United States. Even now such comity of practice would not require a constitutional amendment. It may be that the Virginia delegates to the constitutional convention of 1787, were so accustomed to this procedure they could imagine no other being followed. It is well attested historically that the early practice of presidents of the United States was to take frequent counsel with members of the supreme court on the subject of judicial appointments.

There existed in the Colony of Virginia from the earliest times an executive branch of government in the person of the colonial governor as the direct representative of the king; and a legislative department composed of the council and the house of burgesses—the council appointed by the king on the recommendation of the governor, and the house of burgesses elected by qualified voters of the several townships, plantations, and boroughs.

The house of burgesses of Colonial Virginia was the first popularly elected representative assembly of legislators ever to meet upon the soil of America. They assembled in the small wooden church building at Jamestown, Virginia, with twenty-two members present, on July 30, 1619.

"Counties were not yet laid off, but they elected their representatives by townships. . . And hence it is that our lower house of assembly is called the house of burgesses, a name proper to the representatives of boroughs or towns; and it hath by custom, ever since retained that appellation altho' the burgesses, or members for towns and corporations, are very few and inconsiderable at present in comparison with the representatives of counties."[6]

Stith: *History of Virginia,* cited above.

It was this same house of burgesses which defied the governor of the colony and the king and parliament of England throughout the long period of conflict preceding the Revolution.

In all these contests, the house of burgesses had the active support of the several county courts. It was one of these county courts which on February 8. 1766, solemnly declared the stamp act to be unconstitutional. This is probably the only instance on record wherein an act of the English parliament was so vitiated by the action of a minor court in a distant colony.

The county court of Northampton County, Virginia, being approached by the clerk of the court, and other officials of the county for instructions as to their duties under the stamp act, caused the following opinion to be entered:

"The said act did not bind, or concern the inhabitants of this colony, inasmuch as they conceive the same to be unconstitutional, and that the said several officers may proceed to the execution of their respective offices, without incurring any penalties by means thereof, which opinion the court doth order to be recorded."[7]

It was in 1758, in a celebrated action in the county court of Hanover County, Virginia, wherein a parish minister named Maury brought suit against a vestry for sums claimed as his

6. Stith, note 3 *supra.*

7. Andrews: *Virginia, The Old Dominion.*

due owing to the fact that the colonial legislature of Virginia had computed the salaries due ministers, which salaries were payable in tobacco, at two pence per pound in money. This measure became known as the "twopenny act," and was denounced by the clergy of the established church, and was put into effect without awaiting the signature of the king. The act was vetoed by the royal council in London and the veto opened the way for this suit.

Patrick Henry appeared for the vestry and in his argument boldly declared in terms that simply thrilled his audience, that the king in vetoing a reasonable and beneficial measure had forfeited the right to his subjects' obedience.[8] The jury returned a verdict for one penny for the plaintiff.

These "countie courts" appointed their own clerks, who held office for life. They likewise had all the usual and established appurtenances of grand and petit jurors, and were in intimate contact with the daily affairs of the citizen, and under clear evidence had the full confidence and respect of the community. As courts, they were independent and free. Charged with the administration of justice, they were close to the people. Their every action was under the constant observation of the community.

The fundamentals of the American constitution may be described in the words of Mommsen[9] with respect to the Roman constitution, but universally true. It was "neither manufactured nor borrowed, but grew up *amidst and along* with the (Virginia) people."

In addition to an experience of more than one hundred and fifty years with an independent judicial system, the Virginia delegates to the Constitutional Convention of 1787 had also before them the approval of the system of divided powers as expressed in their own Constitution of 1776, eleven years before.

The Virginia plan embodying an independent judiciary was not the idea of any one man; it was not a thought born of the moment; but it was an idea which had developed, and which had been lived with by these delegates and their fathers and grandfathers—a development in a region described by Gladstone in these words: "Virginia produced more contemporary great men than any other piece of real estate on earth, Greece and Rome not excepted."

The idea of an independent judiciary grew from that same soil. It flowered as the Supreme Court of the United States. It is the keeper of the key to the fundamental charter of our form of government—a form which Benjamin Franklin on the adoption of the Federal Constitution described as: "A republic, if you can keep it."

It is the weakening of this balanced and fundamental plan by steady and continuous inroads upon judicial power by the device of boards, commissions, authorities, and other like agencies of government, each clothed with an unholy admixture of legislative, judicial, and executive power, subject to little, or no review, by the courts, which so seriously disturbs a growing group of thoughtful men; which so imperils our security and thwarts the hope of peace and ordered freedom under law.

8. Eckinrode: *The Revolution in Virginia.*

9. *History of Rome*, i. 104.

This JOURNAL is sent free to all who are interested in the problems of judicial administration. For those who desire more than a passive participation the Society offers its Voting Membership, with annual dues of five dollars, and its Sustaining Membership for those who place a higher estimate upon their responsibility.

New ABA Committee on Procedure Begins Work

BY DAVID A. SIMMONS

Numerous organizations and many individuals are engaged in the task of improving the administration of justice. Sometimes a determined individual can bring about a needed reform, but ordinarily it is quite limited in scope and operation. Organizations such as our Society, and the American Bar Association and state and local associations, through sections and committees, investigate and weigh these proposals and individual accomplishments and bring them to the attention of others similarly interested throughout the country. Coordination of individual effort has enabled this and other organizations to render important service to the public and to the profession, and the cooperation of the several organizations dedicated to the improvement of the administration of justice will undoubtedly have quicker and more far-reaching results. Hence we are happy to have a part in a cooperating movement which had its beginning in Washington on November 11th.

President Jacob M. Lashly, of the American Bar Association, called the "conference to consider the improvement of judicial procedure," at which Judge John J. Parker, a vice-president of our Society, presided. Among those present were the chairman of the National Conference of Judicial Councils; the president and a former president of the American Bar Association; the chairmen of that Association's sections of judicial administration, criminal law, and bar association activities; the administrative officer of the United States courts; representatives of the junior bar conference; the president and a vice-president of the American Judicature Society; and others interested in this field of endeavor. The conference proposed the following program of action to be sponsored by the ABA committee on improvement of judicial procedure, with the aid of associate and advisory committees in the several states working with committees of the state bar associations.

1. To unify the judiciary of the several states by the establishment of judicial conferences under the plan of those provided by the federal administrative office act in states which do not already have judicial councils. These need not await legislation but can be called by the chief justice of the state sua sponte, if he is willing to cooperate.

2. To have procedure in the courts prescribed by rule of court and to obtain legislation to that end where necessary.

3. To secure the adoption of the pretrial practice by the courts of the several states.

4. To improve jury trials by improving the system of selection of jurors, and by eliminating unnecessary jury trials through providing for waiver in proper cases.

5. To simplify trial procedure in accordance with the new federal practice and the recommendations of the American Bar Association.

6. To simplify and modernize the rules of evidence.

7. To secure proper practice in administrative agencies and tribunals with provision for proper judicial review of their decisions.

8. To simplify appellate practice and secure hearing of appeals without bills of exceptions, assignments of error or narration or printing of the record.

The foregoing objectives are not radical departures. Many of them have been achieved in a number of the states. Judicial councils have been established in more than half of the states, and pretrial procedure is functioning in a large number. Under the stimulus of the federal act, many state legislatures are conferring full rule-making power on the courts. Much work is yet to be done by the bench, the bar, and the law schools before the rules of evidence are simplified and modernized. These tasks, unexciting in their details, in their accomplishment will be of the utmost importance in the future of the democratic way of life. The battles of peace are no less important than those of war and are more fruitful for humanity.

Rule-Making in Philippines Under Constitutional Power

BY JOHN W. WILLIS*

THE INFLUENCE of the federal rules of civil procedure on the reform of adjective law has spanned the Pacific. With the promulgation of the new Philippine Rules of Court, effective July 1, 1940, most of the forward-looking features of the new federal procedure have been incorporated into Philippine practice.

Procedure in the Philippine courts has not, as one might expect, followed the civil law. Under the American occupation the old Spanish law was swept away—at least so far as procedure was concerned—and a code of civil procedure put into effect, derived chiefly from the California code with some sections borrowed from Ohio, Massachusetts, Mississippi, Vermont, and other states. Now this in turn has been largely superseded by a reformed procedure based on the federal rules, with numerous provisions of the American Judicature Society's "Model Rules of Civil Procedure" also having been adopted.

The new rules were promulgated pursuant to Article VIII, section 8 of the 1935 Constitution, which provides that

"The supreme court shall have the power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not diminish, increase, or modify substantive rights. The existing laws on pleading, practice, and procedure are hereby repealed as statutes, and are declared rules of court, subject to the power of the supreme court to alter and modify the same. The National Assembly shall have the power to repeal, alter, or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philippines."

Probably the most important step in this reform is the adoption practically without change of federal rules 26 to 37 on depositions and discovery. Philippine discovery practice has hitherto conformed closely to the California model, *i. e.* discovery was practically non-existent except that the production of relevant documents could be compelled and the deposition of an adverse party taken. As to ordinary witnesses, discovery by deposition depended on the fortuitous circumstances of prospective unavailability rather than on the litigants' need for information. All this has now been changed and Philippine discovery practice put in line with the most advanced and liberal procedure.

Pleadings and motions practice under the Philippine rules conforms fairly closely to the new federal procedure, most of the provisions of Rules 7—12 and 15 having been adopted. The demurrer is abolished, at least by implication, and the motion to dismiss substituted. A requirement that "ultimate facts" be pleaded is nevertheless perpetuated.

Parties practice has also been liberalized, the substance of federal rules 19, 20 and 21 having been incorporated in the new rules. Unfortunately, the old code definition of class suits has been retained, and the broad provisions of federal rule 24(b) for intervention on the basis of a common question of law or fact have not been followed.

The provisions of federal rules 18(a) (joinder of claims) and 13 and 14 (counterclaims and third-party claims) have been taken over without substantial alteration, except that the use of third-party procedure is limited to the case in which the third-party plaintiff claims contribution, indemnity, subrogation and so forth, and does not permit the impleader of one claimed to be liable to the original plaintiff.

Pretrial procedure has been made possible with the adoption of federal rule 16 plus a new clause authorizing the court and parties to consider "the possibility of an amicable settlement" at the hearing. Summary judgment is provided for in the language of rule 56. The salutary provisions of rule 41 on dismissal of actions have been followed, and some of the federal rules on subpoenas, reference to masters and so forth have also been adopted. The

*The author is a member of the California Bar, and managing editor of Federal Rules Service, a weekly loose-leaf guide to the new federal practice, which is published by Callaghan and Company.

rules relating to jury trial have not been followed, since there is no right to jury trial in the Philippines.

Apparently the supreme court of the Commonwealth had little doubt as to the propriety of classifying evidence as a matter of practice or procedure. Extensive rules of evidence have been promulgated, including even such seemingly substantive matters as the statute of frauds and the parol evidence rule. However, no substantial reform has been attempted, most of the provisions having been taken over verbatim from the old code of civil procedure, which in turn was copied from the California code.

Rules of criminal procedure are also included. Here again, however, the court seemingly found no need for reform, the code of criminal procedure promulgated by the United States military government in 1900 having been substantially continued.

Besides all the above, the rules (which cover more than 300 pages exclusive of the forms) deal in great detail with appellate procedure, probate and guardianship, contempt, and all manner of special proceedings.

That the federal rules should have so impressed the court and lawyers of the distant archipelago is a tribute to their excellence. For there was in the Philippines no question of conformity between local and federal courts, there being but one court system. If the lawyers of the Commonwealth have been so willing to embrace the new procedure on its merit alone, all the more so should it find favor with the bar of the various states, now under the necessity of knowing two systems of procedure.

State Department of Justice Needed

A committee of the Oregon State Bar has been at work for some time preparing a plan for a department of justice. Its very informative report appeared recently in a pamphlet containing committee reports and the program of the Oregon Bar's sixth annual meeting. Not only is there in the six closely printed pages of the report an able argument as to the need and a description of the form, but also references to much literature on the subject.

The convention, held in October, voted to continue the committee probably because of the need for more mature deliberation. It is not impossible that Oregon will emerge with the best system of prosecution of any state in the country and this would be a great contribution to our national welfare. Oregon voters have been conspicuously progressive for a generation and its lawyers conspicuously conservative for three generations. But to *preserve* the typical local prosecutor's office with all its shortcomings is not to *conserve* the state's interest.

The greatest public interest for a long time in respect to local offices has been that of providing for prosecution as a state, rather than a county function. It took a generation for the idea of state police to spread throughout the states; and now a common proposal is to have all city policing done by officers under state control. The inability to advance reform in the vital function of prosecuting is due in part to the inability of the public to know that there is any better system and to the difficulty of amending a state constitution to effect a change of a technical nature.

The committee's proposal is that there be an approach to the federal system; an attorney general appointed by the governor, prosecutors appointed to serve during good behavior and answerable in all respects to the attorney general. Such prosecutors would be "career men," well paid, selected under a merit system and protected against dismissal for political reasons.

In any proper system the prosecutor would give all his time to his special work and in less populous areas could well serve several counties under modern conditions of travel and communication. Politics would not extend beyond the offices of governor and attorney general. Prosecutors would pool their experience. They would earn more and receive more pay, and would gain a higher professional standing as assistants to the attorney general.

The committee having this important topic

in hand is composed of Chairman W. L. Gosslin, Henry M. Tomlinson and Edwin D. Hicks. Their report is admirable. Concerning the burdens under which the elected, short term prosecutor now operates they say:

"An elected prosecutor, like an elected attorney general is necessarily neck deep in political activities, with all their attendant distractions. He must be "building fences" all the time. His handling of cases seems often affected by public clamor or by powerful influences for or against prosecution. And much time must be taken giving free advice to political constituents on matters entirely outside his official duties. He is also required to advise county and other local officials as to purely local civil matters. Lodge work and other activities calculated to get votes may often occupy a local prosecutor's time and thought. Lacking aptitude, training or even interest in prosecution, a district attorney may prevent effective, or any law enforcement in his county for four years—or even longer, if his popularity is sufficient to ensure his re-election. Other officials in his own and neighboring counties are thereby discouraged from performance of their official duties, and eventually the entire superstructure of law enforcement in a state may become undermined."

If this seems too dark a picture the reader may reflect on the not remote time when for eight years no person having money for defense (of one kind or another) was punished for a felony in one of the most populous counties in the country.

Unique Plan Builds Bar Membership

Of the more populous states Pennsylvania probably has been for a long time a leader in respect to the strength of county bar associations. The attachment of practitioners to their local organizations may be in part due to the fact that county bar libraries have been common, and partly to the rule peculiar to that state which forbids a lawyer to practice in any county except the one in which he has been admitted.

In some counties the local associations have included every practitioner. In the populous county of Lackawanna, in which Scranton is located, it was reported nine years ago that there were 275 lawyers, all members of the county association. (Jour. AJS, 15:4:101) There was a library of 11,000 volumes, with a salaried librarian.

The Lackawanna bar acquired ownership of a weekly "legal newspaper," the receipts from which, at the time of our report, exceeded the Association's expenditures. In April, 1938, this JOURNAL reported another thrifty move, this time in Clearfield and Erie counties, where the judges adopted a rule that provided for deducting ten percent of masters' fees in divorce cases to provide a fund from which the dues of all local lawyers in the State Association would be paid.

The prospect of a general adoption of such a rule and practice in many more counties was urged in opposition to integration of the bar of the state when the state convention was held in June, 1938. It is now timely to present information as to progress, although there is no probability that the painless method of meeting bar expenses will spread to other states.

There are sixty-seven counties in Pennsylvania. In fifteen counties the local associations pay the dues of their members as State Bar members, under what has come to be known as the Clearfield plan. In six other counties there is one hundred percent membership in the State Bar, but the dues are paid individually. In Schuylkill and Lehigh counties plans are now under way for the one hundred percent plan, the state dues to be paid by the Associations; while in Clinton and Elk counties the plan is for individual payment and identical membership in county and state associations.

There are at this time twenty-one counties in which virtually all practitioners are State Bar members, with four more counties in the offing. There will doubtless be further progress in the less populated counties. It is realized that the prospect is not favorable in the most populous counties, and especially in Philadelphia and Allegheny counties, the latter including the city of Pittsburgh.

At the 1940 annual meeting of the State Bar a proposal to reduce dues in counties in which all practitioners are State Bar members was defeated.

Review of Judicial Council Reports

Most of the twenty-three active judicial councils in the United States have issued a report of some kind during the past year, ranging from New York's 416-page volume to brief reports published in some state bar journals. Most cases of inactivity can be traced to lack of funds, and most of those with even fair financing have some impressive accomplishments to show for it.

The tenth report of the New Jersey council went to the governor in typewritten form and has not been published. It consists of elaborate judicial statistics for the year 1939. The ninth annual report of the Michigan judicial council contains judicial statistics for 1938 and a comprehensive study of the wage earners' receivership law and its operation. The Kansas council continues publication of its excellent quarterly bulletins, that of July, 1940, containing a study of debt adjustment laws akin to the Michigan study. The North Dakota judicial council, though hampered by lack of funds, is devoting its attention to the code revision now in progress. It has published no current report.

Brief reviews of the accomplishments of judicial councils in several states appear below, and others will be published in the February number of the JOURNAL.

INDIANA

The 255 page fourth annual report of the Indiana judicial council contains three excellent studies of current problems in that state and outlines of two more to follow.

"A Study of Inferior Courts," promised in the previous report, occupies 127 pages. It covers the history of the courts, their present structure, and criticisms and proposed remedies. The council will follow this with a draft bill for a system of county courts and a small claims procedure designed to remedy the present defects.

A bill to coordinate the work of the state courts, defeated in the 1939 legislature (J.A.J.S., 22:196, 22:268, 23:101), was redrafted and is published with a supporting argument, to avoid some of the misunderstanding that contributed to the 1939 defeat. The third study outlines the law relating to enforcement of judgments, and suggests improvements.

The two reports promised for next year are a general survey of the legal profession in Indiana and a study of delay in the circuit courts.

Adoption of civil procedure patterned after the federal rules was recommended in the previous report, but the supreme court proposed instead that the council select specific features of the federal code which should be adopted in Indiana, and the council was engaged in this work at the time of the report.

Judge Curtis W. Roll of the Indiana supreme court is chairman of the judicial council, and Bernard C. Gavit, Bloomington, is its secretary.

MASSACHUSETTS

The fifteenth annual report of the Massachusetts judicial council, dated December, 1939, and published in the January-March *Massachusetts Law Quarterly*, indicates a variety of activities carried on with remarkable success.

Eighth of its recommendations, one nineteen and another twelve years old, became law last year. An administrative committee of the district courts was given the job of standardizing clerks' hours and times of court sessions; the justices of the supreme judicial court were given authority over the official court reporter in an effort to reduce the four-year delay in publication of reported opinions; the highest court was empowered to grant new trial in capital cases "for any reason justice may require" instead of on mere questions of law; and other improvements in procedure and methods were adopted.

The report reiterates the council's recommendations regarding bar unification, third party procedure, memorandum opinions, and other matters.

A notable service rendered by the Massachusetts judicial council is the furnishing of recommendations upon specific request of the legislature. Four requests were received during the 1939 session for recommendations regard-

ing an intermediate appellate court, slander by radio, common trust funds, and common law assignments.

Frank J. Donahue is chairman of the council, and Frank W. Grinnell is secretary.

NEW YORK

The sixth annual report of the New York judicial council again demonstrates what a well-organized, well-financed judicial council, enjoying the cooperation of the legislature and the courts, can do toward improving the administration of justice.

The judicial council recommended to the 1939 legislature eighteen measures embodied in twenty-two bills. Of the eighteen, ten measures contained in fifteen bills were enacted into law. Four other recommendations involving rules of practice were adopted, and still others were partly adopted. Among those adopted were measures clarifying the right of women to serve on juries, removal of obsolete material in the civil practice act, and improvements in handling of appeals.

The council's ambitious list of recommendations includes a revised judiciary article for the constitution, a unified jury system for the city of New York, pretrial calendar and hearings, an enabling act to permit waiver of jury in criminal non-capital cases, and fourteen other measures of varying importance. Under the heading "List of Subjects Under Consideration" are to be found a total of fifty-three topics relating to organization and jurisdiction of courts, practice, procedure and evidence, administration of the criminal law, and administration of justice generally. Nearly half of these are marked to indicate that research on the subject has been substantially completed.

Chief Judge Frederick E. Crane is chairman of the council, and Leonard S. Saxe is its executive secretary.

TEXAS

Achievement of two of its four major objectives for improvement of judicial administration in Texas was announced by the Texas civil judicial council in its eleventh annual report. Bar integration and judicial rule-making power both materialized during the 1939 legislative session. The other two objectives stressed in the tenth annual report were a better method of selecting judges, and unification of the courts.

The council's agenda, taken from the minutes of the 1939 annual meeting, include also a study of court costs, prolixity of pleadings, shortening of records on appeal, getting better jurors, improvement of judicial statistics, and further efforts to get nine bills already approved through the legislature.

"It remains to accomplish," says President Marion N. Chrestman, "through the bar and judges of the courts a desire for a system of unified courts in the state, with the duty on some officer or officers, judge or judges, to take the responsibility for the work being done by all the courts."

Fresh from notable victories in integration and rule-making, with bar, bench and legislature reform-minded, Texas leaders should find this an opportune time to make some progress toward the first completely unified state court system in the country, as well as a solution of that other difficult problem of selection of judges.

Secretary of the Texas council is Harold A. Bateman.

"The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often where it should mend. . . . The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged."—*Benjamin N. Cardozo.*

"Raise Your Spirit"—A Dissenting Opinion

A recent article[1] entitled "Raise Your Right Hand" requires a dissent, not for any surface differences about formalities attending the formal oath, but rather because of the attack upon the foundation of all order and authority.

The formal or solemn oath acknowledges God. It is an appeal to God to witness the truth. A breach carries with it a violation of conscience as well as the prospect of immediate punishment by the judicial arm. The law makes no unnecessary intrusion into the conscience of any witness and assumes a conscious relationship between man and his Maker. The affirmation is made available for those who do not wish to take an oath.

Those who scoff at truth strive to impair the standards of life which provide the essential basis for unity in our Republic. Neither blasphemy nor mockery will give strength to our citizens or to our nation. Every president from Washington to Roosevelt knew that our nation could not live withut common aspirations toward love and charity—and truth. When we fall upon evil days because of a failure to live truthfully, we should not attempt to do away with truth, or aids to truth. That was tried in Russia, and it failed.

In the article to which I refer, much was said critically about the form of the oath. Touching the Bible was called "mumbo-jumbo." It should be granted that it is necessary to distinguish between an oath and a bare assertion. The oath is evidenced by some unequivocal act by which a person consciously takes upon himself the obligation. The formal acts of raising the right hand or placing the hand upon the Bible are accepted generally by us as evidence of the intention to bind the conscience of the person sworn. Although these acts have come to us from ancient usage that does not make either of them less valuable as visual evidence of the intention.

The efforts of the American Bar Association and of the local bar associations to maintain dignity in the administration of justice and to bring swift punishment to those who would thwart justice, should not be battered down by a defeatist viewpoint.

Thomas F. Quinn, Judge of the District Court of Natick, Mass.

1. Reference is to William M. Blatt's article in this Journal for August, 1940, 24:60.

Dean Wigmore's Preference

October 9, 1940.

To the Editor:

I was pleased to read the excellent article by Mr. Frank Grinnell in the August number of the JOURNAL. His demonstration of the authority of the judiciary to establish their own rules of procedure is complete.

As to his suggestion that in my original editorial stating that "all rules of legislature concerning judicial procedure should be deemed void," which word "void" he would replace by the word "voidable," I should be willing to agree to that as a correction. But on second thought I would rather prefer to leave the phrase out entirely and to say, "rules of legislature should be given only such force as the judiciary should in comity accord to them, etc." This avoids any question as to the relative propriety of "void" and "voidable."

Very truly yours,

John H. Wigmore.

Readers of this paragraph may easily render a service to their profession by sending to the Judicature Society office the names of lawyers and judges who are interested in the problems discussed in its JOURNAL. To all such the JOURNAL will be sent free.

Pretrial Pleases Chicago Lawyers, Press and Public

Pretrial procedure has survived a two months test in the Chicago municipal court with colors flying. A statistical report issued November 1 by Judge Oscar S. Caplan affords evidence of its effectiveness in clearing the calendar and promoting prompt disposal of civil controversies. Some time before the release of these favorable figures the complaints that greeted pretrial when it was started September 4 had been turned into almost universal commendation by lawyers, civic groups, newspapers and local bar organizations.

All of the 4517 cases on the calendar were called. Roughly one-third of them went over for jury trial, another third were disposed of by other court proceedings, and the remainder, about 31 per cent of the total, were disposed of directly by pretrial hearings. There were 662 cases settled in the conferences, 512 disposed of by ex parte judgments and dismissals for want of prosecution, and 299 pending settlement after one conference. During that time 321 cases went to trial, so that the combined total represents a tremendous attack upon a crowded court calendar.

The Chicago experience again demonstrates the truth of the statement by Mr. Justice Laws of Washington in his address before the section of judicial administration of the American Bar Association at Philadelphia, that where pretrial succeeds it does so only because of the willing cooperation of all parties interested, including the bar. The newspapers have been generous with publicity, and widespread public interest has led to more than twenty lectures on the subject before civic groups. At first a few attorneys grumbled about being forced to trial, but the system has now won such approval that cases not set on the pretrial call by the chief justice are placed there by agreement.

The entire pretrial calendar is handled by one judge, Judge Oscar S. Caplan.

New Civil Code Drafted in Colorado

Stimulated by the accomplishments of the federal supreme court's rules committee, the Colorado Bar Association obtained from the legislature authority for a revision of rules and devoted a considerable part of two years in preparation of the new code. The drafting was done by seventy volunteers and after debate and amendments, was approved by the State Bar Association at its convention in September. At the time this is written the rules are under consideration by the supreme court.

The Colorado Bar Association includes eighty percent of all practitioners, owing to its success in federating all the local associations. Were it not for the unwillingness of some Denver lawyers to join any professional organization the membership would be virtually all-inclusive. The convention planned important work for the ensuing year; reform in the selection of judges, an economic survey of the profession, a study of

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It will scarcely be said that a constitutional court of competent jurisdiction should omit or stay performance of any of its judicial functions because of prior legislative encroachment or until the passage of a legislative act "conferring" any judicial power that it possessed.—*Frank E. Atwood.*

The successful enforcement of the law in a democracy must always rest primarily in the fact that on the whole it commends itself to a universal sense of justice, shared even by those who violate it.—*George Sutherland, J.*

debtor laws, minor courts, and improved procedure in disciplinary cases. The Colorado Junior Bar Conference has undertaken to provide a system that will afford new practitioners an interneship.

Connecticut's "Jungle of Confusion"

Some improvement in the local courts of limited jurisdiction in Connecticut has been effected through legislation that was long overdue. The state can be proud of its superior court and the supreme court made up of superior court judges. There is also a common pleas court concerning which there appears to be no complaint. The seventy city, borough and town courts, having almost no unity of jurisdiction, and the still more numerous justice of the peace courts, have been referred to recently by a State Bar committee as a "hopeless jungle of confusion."

The state judicial council worked out an organized system for the city, borough and town courts ten years ago, but the political strength of the officials involved prevented legislative action. The plan involved appointment by the governor, instead of the legislature, unified jurisdiction and procedure, superintendence, and the taking of trial powers from all justices of the peace.

Finally the State Bar committee and a Governor's committee drafted bills for uniformity among the city, borough and town courts, now grouped as "the minor courts," and also the justices. An "assembly of judges" is provided for each of the two groups. Only one justice in each town, to be chosen by the selectmen, will have criminal jurisdiction, and he will be paid a salary. The new law leaves to the minor courts' assembly of judges a deal of difficult problems, especially as to appeals. There will have to be test cases and further legislation.

A very full account of the situation was published in Connecticut Bar Journal (14:3:230, July 1940), the authors being Allyn Larrabee Brown, Jr., and Gregory Hancock Doherty. The authors suggest that under the recent statute "the justice system can and probably will be more firmly intrenched than ever," but yet may result eventually in integrating the justice courts with the minor court system. Their concluding words are expressive: "The courts of the justices of the peace will no doubt be with us for some time and the state should make the best of the situation."

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933

Of Journal of the American Judicature Society, published bi-monthly at Chicago, Ill., for the year ending Oct. 1, 1938.

State of Michigan } ss.
County of Washtenaw }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Herbert Harley, who, having been duly sworn according to law, deposes and says that he is the Editor of the Journal of the American Judicature Society and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Judicature Society, Law School, Ann Arbor, Mich.

Editor, Herbert Harley, Law School, Ann Arbor, Mich.

Managing Editor, Herbert Harley, Law School, Ann Arbor, Mich.

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2. That the owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one per cent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member must be given.)

American Judicature Society, a non-stock corporation, organized under the Illinois act for non-pecuniary corporations.

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HERBERT HARLEY.

Signature of editor, publisher, business manager or owner.

Sworn to and subscribed before me this 23rd day of September, 1940.

KATHERINE KEMPFER,
(SEAL) Notary Public.

(My commission expires May 27, 1944.)